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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

UNITED STATES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a seniority system that has been found to be free of any discriminatory purpose is protected by Section 703(h) of Title VII.

2. Whether a test for determining the bona fides of a seniority system which focuses exclusively on discriminatory effect is consistent with this Court's decision in *Teamsters* v. *United States*.

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the Court of Appeals: Georgia Power Company, a member of Southern Company, a holding company of four utilities; Charles King and Willie Moreman, representing themselves and a class of all black Laborers employed at the Atkinson-McDonough Plant of the Georgia Power Company at the time of trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Local Union No. 84, International Brotherhood of Electrical Workers, AFL-CIO, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Georgia Power Co.*, 634 F.2d 929, entered on January 22, 1981.

OPINIONS BELOW

The decision of the district court after trial is reported at 3 FEP Cases 767 (N.D. Ga. 1971), and is reprinted in the separate Appendix hereto as App. E (70a-128a). The first opinion of the court of appeals is reported at 474 F.2d 906 (5th Cir. 1973), and is reprinted as App. D (32a-69a). The order of the district court modifying the Amended and Final Decree is re-

ported at 470 F.Supp. 649 (N.D. Ga. 1979), and is reprinted as App. C (23a-31a). The order of the district court denying private plaintiffs' motion to reconsider the modification (September 28, 1979) is reprinted as App. B (18a-22a). The opinion of the court of appeals vacating the modification—the decision from which certiorari is sought—is reported at 634 F.2d 929 (5th Cir. 1981), and is reprinted as App. A (1a-17a).

JURISDICTION

The court below entered judgment on January 22, 1981, App. F (129a). On April 2, 1981, Mr. Justice Powell extended the time for filing this petition to and including June 21, 1981, App. G (131a). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent parts of Sections 703(a), (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g) are reprinted in an appendix in the back of this petition.

STATEMENT OF THE CASE

A. Procedure

This case originated as three employment discrimination suits brought under Title VII of the Civil Rights Act of 1964. Two of the suits were class actions by private plaintiffs and one was a pattern and practice suit by the United States. All three were consolidated for trial. In June 1971, the district court made findings of fact and conclusions of law following an extensive trial. *United States* v. *Georgia Power Co.*, App. E. That decision was appealed and the court of appeals remanded for further consideration of the testing practices used

by the Georgia Power Company and of the propriety of awarding back pay and further seniority relief in order to fully remedy the Company's discrimination. App. D. On January 31, 1974, an Amended and Final Decree was entered. 7 EPD ¶ 9167.

The Amended and Final Decree was directed almost exclusively to affirmative and monetary relief from the Company. However, one section of the decree did affect the seniority system by allowing affected class members to assert Company seniority in certain instances rather than the collectively bargained job classification seniority. App. 4a-5a. This modification of the seniority system was based on the theory, enunciated in *Local 189, Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), that an otherwise neutral seniority system violated Title VII if it perpetuated the effects of prior discrimination.

Following this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977), petitioner Local 84, International Brotherhood of Electrical Workers, moved that the 1974 decree be modified to allow full application of the collectively bargained seniority system. The union argued that further application of the decree's seniority provisions would be inequitable because they were based on a theory of Title VII liability rejected in *Teamsters*. The district court agreed with Local 84's assessment and ruled that part of the decree's seniority provisions would no longer be given prospective effect. App. 24a-27a. The court allowed certain affected class members to continue to assert Company seniority as a remedy for discrimination suffered at the hands of the Company. App. 27a-28a.

The private plaintiffs appealed the district court's modification of the decree. The court of appeals agreed with the district court that *Teamsters* represented a sufficient change in the law to warrant modification of the injunctive decree, relying in part on the en banc decision

of the Fourth Circuit in *Patterson* v. *American Tobacco Co.*, 634 F.2d 744 (1980). App. 6a-9a. The court of appeals did not agree, however, that the seniority system at Georgia Power was bona fide. Hence, it held that the district court had abused its discretion in modifying the decree on the basis of *Teamsters*. App. 17a.

The court of appeals tested the district court's determination that the seniority system was bona fide against Fifth Circuit precedent on the question. App. 10a. The court of appeals reviewed the findings made by the district court in 1971 and applied to these findings the four-part test developed by the Fifth Circuit for determining the bona fides of a seniority system. *Swint* v. *Pullman-Standard*, 624 F.2d 525, 530-534 (5th Cir. 1980), *cert. granted*, Nos. 80-1190 and 80-1193, 49 U.S.L.W. 3788 (April 20, 1981). In applying this test, the court of appeals found the following factors to be significant:

> 1. while the seniority system applied equally to all workers, it tended to discourage cross-section transfers and to that extent had a disproportionately adverse effect on black workers who had been assigned to the lowest paid sections;
>
> 2. the seniority units were not based on separate bargaining units;
>
> 3. the seniority system originated during a period of overt discrimination by the Company; and
>
> 4. the seniority system was based on job classifications and sections, and the Company had once had a policy of restricting black workers to the lowest paid of these sections. App. 12a-15a.

Because it had found that all four of these factors indicated the seniority system was not bona fide, the court of appeals vacated the district court's order modifying the decree. App. 11a-12a.

B. Facts

The operative facts of this case are set forth in the district court's findings of June 30, 1971. App. E. On appeal, these findings were affirmed, except that the court felt further validation of the Company's testing requirements was necessary. App. D. The district court relied upon the 1971 findings in modifying the decree, App. C, and the court of appeals relied upon them in vacating the modification, App. A.

The lawsuits that comprise this case encompassed every aspect of the hiring and promotion practices at the Georgia Power Company and the application of the collective bargaining agreement between the Company and the seven local unions, now merged into Local 84. App. 70a-71a. Local 84 was a named party in all three of the suits.

Plaintiffs in all three suits attempted to prove intentional discrimination on the part of the union. They alleged that Local 84 had failed to protect the interests of black workers in contract negotiations and that it had bargained for the maintenance of a seniority system that limited the promotion possibilities of black workers. Prior to trial, a preliminary injunction issued modifying the seniority system with respect to black workers hired before July 1963. App. 71a-72a. This modification was ordered because the system tended to perpetuate pre-1963 discrimination. Further preliminary relief on that basis was denied. Thus, plaintiffs had a compelling reason to show intentional discrimination on the part of the union, since relief on the basis of discriminatory impact had been limited much more narrowly than plaintiffs wished.

Despite plaintiffs' attempts to show that Local 84 had intentionally discriminated against them, the district court found "no showing of any conscious intent." App.

115a-116a. The court noted that the union had long been integrated and that it had vigilantly represented the interests of black workers. App. 104a. It also found that the lines of progression provided in the seniority system contained functionally related jobs and that the system itself "applied equally to whites and blacks." App. 76a and 107a.

Although no intentional union discrimination was shown, the seniority system was modified "under the retrospective rationale of Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969)." App. 71a, and 67a, 106a, and 116a. The seniority system was found unlawful insofar as it perpetuated the Company's discriminatory policies by locking black workers hired prior to July 1963 into positions behind contemporaneously hired white workers. App. 105a-106a.

Prior to July 29, 1963, the Company had an open policy of assigning blacks to the lowest paid jobs of Janitor, Porter, Maid and Laborer. Black workers were not allowed to transfer out of these jobs until the Company discontinued its segregationist policy. App. 34a-35a. Shortly after it began allowing black workers to transfer, the Company imposed the requirements that anyone seeking transfer from one of the traditionally black jobs had to possess a high school education and pass an aptitude test. App. 79a-80a.

For promotion, seniority at Georgia Power is determined by the length of time an employee has served in his job classification and in his department. The contract's term for department is "section." Each section consists of job classifications arranged in lines of progression. Vacancies are filled by the senior employee in the same job classification as the vacancy. If no such employee seeks the job, it is filled by the senior employee in the next lower classification in the section. The

amount of time an employee has served in his section, i.e., section seniority, is important in layoffs and recall from layoff. If an employee transfers between sections, he loses his seniority and starts from the beginning in his new section. App. 76a-77a.

The jobs of Janitor, Porter, and Maid are each in separate sections. Until 1969, the job of Laborer was in a separate section, but in that year the Laborers were merged into other sections. The Laborer's position became the entry level job in various lines of progression. Those who had been Laborers prior to 1969 were allowed to bring their seniority with them to their new sections. App. 77a-78a.

The district court found that the seniority system tended to perpetuate the effects of the Company's discrimination because the Company had made discriminatory assignments by section. Blacks were assigned to the lowest paid sections and kept there until 1963 as a result of overt discrimination. Thereafter, the seniority system made transfers costly because an employee lost his section seniority upon transfer. In the 1971 order, black employees hired prior to July 19, 1963, were allowed to use Company rather than section seniority "to avoid the discriminatory effect of the Company practice." App. 106a.

On appeal, the Fifth Circuit affirmed the findings of the district court, except that it found the validation of the Company's aptitude tests to be inadequate. App. 48a. The court of appeals agreed with the district court's assessment of the seniority system, but suggested that broader relief might be necessary under the rightful place theory, especially if further Company violations were found. App. 66a-68a. On remand, the district court redefined the affected classes entitled to seniority relief to include all black workers affected by the Com-

pany's unlawful hiring, testing, and educational policies. 7 EPD ¶ 9167.

Following the *Teamsters* decision, the district court restricted the affected classes to those employees entitled to relief under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). The decision of the court of appeals vacating this modification is under consideration here.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *TEAMSTERS* v. *UNITED STATES*

Section 703(h) of Title VII provides,

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . .
> 42 U.S.C. § 2000e-2(h).

In *Teamsters* v. *United States*, this Court held that Section 703(h) protects bona fide seniority systems even if they perpetuate the effects of prior intentional discrimination by the employer. 431 U.S. 324, 349-54 (1977). In so holding, the Court rejected the Government's contention that a seniority system which perpetuated prior discrimination could not be bona fide, stating that, "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54.

The purpose of Section 703(h) is to protect every seniority system, regardless of its effects, so long as it is not a ruse intended to perpetuate employment discrimination. Thus, this Court has stated, "[A]bsent a discriminatory purpose, the operation of a seniority system

cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). The reason for this focus on "discriminatory purpose" is obvious. If a seniority system has a disparate impact on blacks and is maintained by the parties for that purpose, it is a ruse to discriminate in a facially neutral manner. Congress did not mean to allow employers and unions to carry out intentionally discriminatory policies through facially neutral practices; consequently, it exempted such practices from Section 703(h)'s coverage by specifying that only bona fide seniority systems are protected and that intentional discrimination remains unlawful even when shrouded in the provisions of a collective bargaining agreement. However, it did mean to protect "neutral, legitimate" seniority systems regardless of their impact. *Teamsters* v. *United States*, 431 U.S. 324, 353-54 (1977).

At trial, the district court considered the purpose and effect of the seniority system at Georgia Power. With respect to those black employees hired before July 29, 1963, remedial seniority credit was necessary "to avoid the discriminatory effect of the company practice." App. 106a. With respect to employees hired after July 29, 1963, the court found that the seniority system was not discriminatory and applied equally to blacks and whites alike. App. 107a. The court of appeals did not disagree with these findings, but suggested that broader seniority relief might be warranted if broader Company discrimination were found by the district court on remand. App. 67a.

The district court noted that the primary reason for the union's presence in the case was as a necessary party under the collective bargaining agreement and that the evidence showed that was the only reason for its presence. App. 128a. The court stated that "no showing of

any conscious intent has been made" with respect to the seniority system's discriminatory impact. App. 115a. It made other findings that indicated the seniority system was neutral and legitimate. The union itself was integrated and represented black workers fully. App. 104a. The lines of progression were rational. App. 76a. The seniority system applied equally to whites and blacks. App. 107a.

In its recent decision, the court of appeals dismisses the significance of the district court's finding that the seniority system involved no "conscious intent" to discriminate. App. 15a. It implies that the district court's statement concerning "Complaints of general discriminatory patterns and practices by the Unions" does not apply to the seniority system. However, this is the rubric under which the district court addressed whether the union discriminated through the operation of its seniority system. App. 73a.

The district court found that the union was a proper party to the suits and the relief under the rationale of *Local 189, Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), because its seniority system tended to perpetuate the Company's prior discrimination and because its contract permitted the Company's discriminatory educational requirements. App. 116a. After this conclusion, the court stated, "Otherwise, there is no evidence of any discrimination by the defendant unions and further relief is denied." App. 116a. The court of appeals reads this statement as applying to the allegations that the union discriminated in handling grievances. App. 16a. That reading is too restrictive. While the statement may be inclusive of the grievance allegations, the "further relief" referred to is the seniority relief sought by plaintiffs for those black workers hired after 1963. App. 106a-108a. Implicit in the district court's denial of this further relief in its 1971 order is the finding that the

seniority system had no discriminatory purpose. If it had such a purpose, the district court would have been compelled to grant the further relief sought by plaintiffs.

The question of discriminatory purpose was litigated at trial. In its most recent order, the district court noted, "the character of the collectively bargained for seniority system was put in issue at the consolidated trial of this action." App. 21a. This observation is correct.

Plaintiffs in all three of the cases consolidated for trial attempted to prove intentional discrimination on the part of the union. In *King* v. *Georgia Power Co.*, the plaintiffs claimed that Local 84 contracted for the maintenance of a seniority system that limited the promotion possibilities of black workers and failed to fairly represent black employees. 295 F.Supp. 943 (N.D. Ga. 1968). In *Moreman* v. *Georgia Power Co.*, the plaintiffs claimed that Local 84 had failed to protect their interests in contract negotiations. 310 F.Supp. 327 (N.D. Ga. 1969). Both the private plaintiffs and the government took extensive discovery regarding the seniority system and collective bargaining at Georgia Power. *E.g.*, *King* v. *Georgia Power Co.*, 50 F.R.D. 134 (N.D. Ga. 1970); *United States* v. *Georgia Power Co.*, 301 F. Supp. 538 (N.D. Ga. 1969).

After the district court's ruling on preliminary relief, plaintiffs had even greater incentive to prove purposeful discrimination in the seniority system, because the court indicated that it was unwilling to extend seniority relief further on the perpetuation of past effects theory. App. 71a-72a. Plaintiffs failed to show any discrimination on the union's part other than that its seniority system perpetuated the effects of Company discrimination, and the district court refused to grant seniority relief beyond what it felt was warranted by that theory. App. 116a.

Absent purposeful discrimination, a seniority system is protected by Section 703(h) regardless of its effects. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). That issue has been fully litigated in this case and it was decided that there was no purposeful discrimination. Despite the court's finding that there was no discriminatory purpose to the seniority system at Georgia Power, the court of appeals concluded that it was not bona fide and not entitled to the protection of Section 703(h). There could be no clearer indication that the Fifth Circuit intends to disregard the substance of this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977).

II. THE FIFTH CIRCUIT'S FOUR PART TEST FOR DETERMINING THE BONA FIDES OF A SENIORITY SYSTEM RENDERS MEANINGLESS THIS COURT'S DECISION IN *TEAMSTERS* v. *UNITED STATES*

In *Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court clearly held that before a seniority system can be deprived of protection under Section 703(h) it must be shown to have a discriminatory purpose. *Teamsters* rejected the theory, advanced in *Local 189, Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), that a seniority system which perpetuates the effects of prior discrimination is not protected by Section 703(h) regardless of its purpose. In a line now extending through four cases, the Fifth Circuit has developed a four part test for determining whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system.[1] As the Fifth Circuit's application of that test has developed, it has become clear that the test's purpose is to resurrect

[1] The fourth case is *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981). *Terrell* relies heavily upon both *Swint* and *Georgia Power*. 644 F.2d at 1115, 1118, and 1119.

the theory of *Local 189* clothed in the language of the *Teamsters* decision.

The four part test for purposeful discrimination was first enunciated in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). There it was described as merely four factors deemed significant in this Court's concrete analysis of the seniority system under consideration in *Teamsters*. 559 F.2d at 352. In *James*, the court was not actually examining a seniority system to determine its bona fides, but rather was explaining its view of *Teamsters* in order to aid the district court in applying that decision. 559 F.2d at 353.

Since *James*, the Fifth Circuit has actually examined several seniority systems with respect to the four factors noted in that decision; in so doing it has developed a rigid four part test. In *Swint* v. *Pullman-Standard*, 624 F.2d 525 (1980), *cert. granted*, Nos. 80-1190 and 80-1193, 49 U.S.L.W. 3788 (April 20, 1981), the Fifth Circuit firmly established that no flexibility would be allowed in the application of this test. With its decision in *Georgia Power*, App. A, the Fifth Circuit has made clear that the effect and intent of its four part test is to "make an 'endrun' around the decision in *Teamsters*." *Carroll* v. *Steelworkers*, 23 FEP Cases 238, 248, n.8 (D. Md. 1980), (describing a remarkably similar evasion by EEOC).

In this case, the court of appeals refused to directly address the question of discriminatory purpose, dismissing the district court's earlier finding on that issue, with the comment, "A failure to show conscious intent to discriminate does not preclude a finding of discriminatory purpose." App. 15a.[2] Instead, the court of appeals

[2] This statement appears to be in conflict with the definition of discriminatory purpose given by this Court in *Personnel Admin-*

found discriminatory purpose on the basis of its four part test. The application of that test in this case shows that it merely redefines discriminatory purpose so that the standards enunciated in *Local 189* for determining a seniority system's bona fides are still viable. In short, the Fifth Circuit finds disparate impact sufficient to prove discriminatory intent.

The first factor noted by the court of appeals in determining that the Georgia Power seniority system was not bona fide is that it has a disparate impact on black workers hired during the period of Company discrimination. App. 12a. The system has this impact because it is essentially departmental in nature and the Company at one time assigned black workers exclusively to the lowest paid departments.[3] There is no doubt that the Company engaged in purposeful discrimination. However, the fact that this discrimination continued to have

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istrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979). In *Feeney* the Court stated, " 'Discriminatory purpose', however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group." 442 U.S. at 279 (footnotes and citations omitted). Although *Feeney* was not a Title VII case, its definition of discriminatory purpose has been applied in determining the bona fides of a seniority system for Section 703(h) purposes. *Carroll* v. *Steelworkers*, 23 FEP Cases 238, 248 (D. Md. 1980), *aff'd per curiam*, No. 80-1412 (4th Cir. December 30, 1980).

[3] The court exaggerates the disparate impact by failing to note that many white workers were also placed in departments that were less than the most desirable. For example, meter readers in Section XV had no chance for advancement without transferring to another section and thereby losing their seniority. Their maximum wage rate under the 1968 agreement was $668.00 per month, while employees in Section XI could advance through eight job classifications to a maximum of $984.00. Gov't Exhibit 2, 75 and 77.

some effect because of the structure of the seniority system does not establish that the seniority system had a discriminatory purpose.

The second factor considered by the court of appeals is that the seniority units are not each in separate bargaining units. App. 13a. Because they are not in separate bargaining units, the court of appeals did not consider the district court's findings that the seniority units are made up of "functionally related jobs," App. 76a, and that the system itself "is not untypical of those negotiated through collective bargaining," App. 27a. It is completely irrational to attach any significance to the fact that the seniority system at Georgia Power encompasses only one bargaining unit.[4] Moreover, it is contrary to this Court's direction in *Teamsters* that departmental and job seniority systems are just as entitled to protection under Section 703(h) as company-wide seniority systems. *Teamsters* v. *United States*, 431 U.S. 324, 355 n.41 (1977).

The third factor considered by the court of appeals is that the seniority system had its genesis in a period of overt racial discrimination by the Company. App. 13a-14a. This factor cuts both ways, however. The fact that the Company had an open policy of allowing blacks to work only in certain departments meant that the seniority system was irrelevant to the segregationist employment patterns. Regardless of seniority, the Company would not allow blacks to work in any other than four sections. In fact, against this background the nondis-

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[4] The district courts in the Fifth Circuit have expressed difficulty in determining the meaning of this second factor. *E.g.*, *Swint* v. *Pullman-Standard*, 17 FEP Cases 730, 734 (N.D. Ala. 1978); *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1103, 1132 (N.D. Fla. 1979). Thus far, they have apparently guessed wrong, and it is doubtful that the direction given in *Georgia Power* will alleviate the problem.

criminatory nature of the fully integrated union stands out in bold relief. Judge Pointer found similar facts to be significant in determining that the Steelworkers' seniority system did not have a discriminatory purpose. *Swint* v. *Pullman-Standard*, 17 FEP Cases 730, 737-38 (N.D. Ala. 1978); *accord*, *Carroll* v. *Steelworkers*, 23 FEP Cases 238, 245-46 (D. Md. 1980), *aff'd per curiam*, No. 80-1412 (4th Cir. December 30, 1980). Local 84 submits that Judge Pointer's method of analysis is much closer to the spirit of the *Teamsters* decision than the method followed by the Fifth Circuit in *Swint* and *Georgia Power*.

Finally, the court of appeals concluded that the seniority system was not negotiated and maintained free from any discriminatory purpose because it "tracked and reinforced the purposefully segregated job classification scheme maintained by the company." App. 14a. The court reached this conclusion because blacks were at one time assigned to the sections with the lowest paid jobs and the seniority system was such that transfer from these sections, when the Company finally allowed such transfers, resulted in a loss of section seniority.[5] To say

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[5] Three of the four black job classifications were essentially maintenance jobs—Janitor, Porter, and Maid. These jobs are functionally unrelated to any other jobs and remained in separate sections following entry of the Amended and Final Decree. The other predominantly black job classification was Laborer. In 1969, Laborers were merged into other sections according to the functional relationship between the Laborer's job and the jobs in each section. The court of appeals suggests that this change was made to benefit white workers hired as Laborers. App. 14a. However, the changes were of much greater benefit to black workers as they continued to make up the bulk of employees in that classification and tended to have more seniority in that section than white workers. App. 82a-85a. Merging these workers into previously all white sections was detrimental to a number of white workers because they suddenly had to compete with more senior black workers who had not previously been in their seniority unit. A

that the seniority system "tracked and reinforced" the Company's discrimination is to say nothing more than that it tended to perpetuate the effects of that discrimination. Whenever a seniority system perpetuates prior discrimination there must be some relationship between the system and the form of discrimination, otherwise the system could not perpetuate the effects of the discrimination. By the court of appeals' reasoning, if a departmental seniority system has a disparate impact on a particular racial group because the employer has assigned members of that group to the least desirable departments, the departmental seniority system is per se unlawful. That reasoning is contrary to *Teamsters*.

Taken by themselves or in aggregate, the four factors considered by the court of appeals show nothing more than that the seniority system had an adverse impact on certain black workers because the Company had a policy of assigning blacks to the least desirable sections and not allowing them to transfer out. Yet based on this disparate impact alone, the court of appeals found discriminatory purpose and denied the protection of Section 703(h) to the seniority system.

The effects of this method of analysis will not be confined to the seniority system at Georgia Power. The *Georgia Power* decision has already become ensconced, along with *Swint*, in the line of Fifth Circuit precedent on the question of discriminatory purpose. Thus, in a recent decision the Fifth Circuit has stated,

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more logical explanation for that change is that faced with these lawsuits, the Company and the union tried to minimize any adverse impact that the seniority system had on blacks in order to limit liability under *Local 189*. The Laborers could be merged into other sections because their jobs were functionally related to the jobs in those sections. The Janitors, Porters and Maids could not be merged into other sections because their jobs were unrelated to any other jobs.

> We have since [*James*] held that disparate impact constitutes not only relevant evidence of discriminatory purpose, *Swint*, but can conclusively resolve the "equality" factor in favor of those who have suffered such discrimination. *See Georgia Power.*
> *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112, 1119 (1981).

Even in the more concrete form described in *James* v. *Stockham Valves*, this four part test has created confusion among the district courts of the Fifth Circuit. It now threatens to give these courts serious misdirection in applying Section 703(h). Prior to the recent trilogy of *Swint*, *Georgia Power*, and *Terrell*, Judge Stafford of the Northern District of Florida expressed misgivings about the Fifth Circuit's direction:

> It does not appear from Teamsters itself that the Supreme Court intended to fashion a rigid test from these four criteria. Rather, these were matters used to bolster the Court's conclusion in that case. Swint v. Pullman-Standard, 17 FEP Cases 730, 734 (N.D. Ala. 1978). Considerable difficulty is entailed by attempting to apply the four factors to every case, no matter how dissimilar to the factual circumstances in Teamsters. This court is obliged to follow the lead of the Fifth Circuit, however.
> *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1103, 1131 (N.D. Fla. 1979).

Judge Pointer of the Northern District of Alabama has made two praiseworthy attempts to salvage the spirit of the *Teamsters* decision while following the Fifth Circuit's four point formula, both times he has been reversed. *Swint* v. *Pullman-Standard*, 17 FEP Cases 730 (N.D. Ala. 1978), *rev'd* 624 F.2d 525 (5th Cir. 1980), *cert. granted*, Nos. 80-1190 and 80-1193, 49 U.S.L.W. 3788 (April 20, 1981); *Terrell* v. *United States Pipe and*

Foundry Co., 22 FEP Cases 1695 (N.D. Ala. 1979), *rev'd* 644 F.2d 1112 (5th Cir. 1981).[6]

In this case, Judge Murphy simply relied on previous findings that there was no intent to discriminate in the seniority system at Georgia Power. That issue had been litigated earlier in trial, and it was decided that the seniority system was free of any discriminatory purpose. The court of appeals ignored the findings on this question and applied its four part analysis to find discriminatory purpose based on the effects of the system. Of the four Fifth Circuit decisions developing this analysis, *Georgia Power* gives the clearest indication that the Fifth Circuit intends to apply its four part test to find discriminatory purpose and liability under *Teamsters* in every instance where it would have previously found discriminatory impact and liability under *Local 189*.

The Fifth Circuit's test for determining the bona fides of a seniority system is similar in form and substance to the "Zimmer criteria" applied by the Fifth Circuit in equal protection cases. *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (1973), *aff'd on other grounds sub nom.*, *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). The Fifth Circuit continued to apply this test which focused on discriminatory effect even after this Court held that it is necessary to show discriminatory purpose to prove a violation of the Equal Protection Clause. *Mobile* v. *Bolden*, 466 U.S. 55, 71 (1980). Just as it was necessary for this Court to explain that an abstract test focusing on effect was insufficient to estab-

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[6] Judge Pointer's decision in *Swint* was followed in *Carroll* v. *Steelworkers*, 23 FEP Cases 238 (D. Md. 1980). Judge Miller's opinion in *Carroll* is another example of how district courts should apply *Teamsters*. His decision was affirmed by the Fourth Circuit in a *per curiam* decision "for the reasons assigned by the district court." No. 80-1412 (December 30, 1980). Judge Miller would almost certainly have been reversed by the Fifth Circuit applying its *Swint* test.

lish discriminatory purpose in equal protection cases, it is now necessary that the Court explain that a similar test will not establish discriminatory purpose in Title VII cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTE INVOLVED

Section 703(a), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(c) provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of em-

ployment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) provides as follows:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . .

Section 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) provides as follows:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsi-

ble for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the persons or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Office-Supreme Court, U.S.
FILED
JUN 15 1981
ALEXANDER STEVAS,

80-2117

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

No. 79-4073

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGIA POWER COMPANY *et al.*,
Defendants.

CHARLES KING, *et al.*,
Plaintiffs-Appellants,

v.

GEORGIA POWER COMPANY *et al.*,
Defendants-Appellees.

WILLIE C. MOREMAN,
Plaintiff-Appellant,

v.

GEORGIA POWER COMPANY *et al.*,
Defendants-Appellees.

Jan. 22, 1981

Appeal from the United States District Court for the Northern District of Georgia.

Before GEWIN, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

RONEY, Circuit Judge:

Plaintiffs appeal from an order of the district court, 470 F.Supp. 649, modifying a 1974 decree with respect to a racially discriminatory seniority system at Georgia Power Company. The district court found it had become inequitable to enforce changes required in the seniority system by the original decree because a recent Supreme Court decision sustained bona fide seniority systems, even though they have a racially discriminatory impact. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Concluding the seniority system here was not bona fide within the meaning of section 703(h) of Title VII, 42 U.S.C.A. § 2000e-2(h), and thus did not come within the *Teamsters* holding, we reverse.

This case began in 1968 when two race discrimination suits by private plaintiffs were consolidated with a Title VII pattern and practice suit brought by the United States against Georgia Power Company and seven locals of the International Brotherhood of Electrical Workers. The seven locals have since been combined into one local and the unions will be referred to herein as Local No. 84.

In 1971, following an extensive trial, the district court found unlawful many of Georgia Power's employment practices. *United States* v. *Georgia Power Co.*, 3 Empl. Prac.Dec. ¶ 8318 (N.D.Ga.1971). Among other findings, the court found that prior to December 1963 Georgia Power had assigned all blacks to the lowest job classifications, those of Laborer, Janitor, Porter and Maid; all whites were assigned to other job classifiations; and blacks were not permitted to transfer to higher job classifications. In 1963, blacks were permitted to transfer to other job classifications only if they possessed a high school education and achieved a passing score on one or more aptitude tests. Such requirements were not imposed for any other transfers within the company.

Layoffs, promotions, demotions, work locations, shift assignments, and other competitive aspects of employment at Georgia Power were based on seniority. Seniority rights at Georgia Power were determined on the basis of the amount of time an employee had spent in his particular job level and in his seniority unit. Except for the special conditions imposed on blacks, transfers between units were permitted, but seniority gained in one unit could not be transferred to the new unit. In the event of a layoff, however, seniority in the old unit could be used to reacquire a job in the old unit.

The four lowest job classifications were maintained as separate seniority units, so that between 1963 and 1969, any black transferring from those job classifications to a traditionally all-white job was required to give up all his seniority rights. Unlike other seniority units, which were part of lines of progression and through which an employee could advance as he accumulated seniority, the four lowest job classifications were not part of any line of progression. Thus, in order for blacks to advance to a better, higher-paying job, they had to forfeit their seniority.

In 1969, the collectively bargained-for seniority system was modified slightly so that Laborers became members of the sections in which they had been working, and the seniority they had acquired as Laborers became the section seniority in that unit. The classifications of Janitor, Porter and Maid, however, remained in separate seniority units with no chance to progress except by transfer to another section with loss of seniority.

The district court found Georgia Power's practices prior to 1963 operated to keep black employees perpetually beneath contemporaneously hired whites. The court ordered that time spent in the four lowest classifications prior to 1963 be credited toward any future promotion. As to the practices after 1963, however, the court held

that since blacks were free to transfer out of the lower classifications on the same basis as whites and in preference to a new hiree and since under the 1969 collective bargaining agreement time spent as a Laborer was counted as seniority in that unit, operation of the seniority system after 1963 did not subject blacks to unequal treatment because of their race. The court found the high school diploma requirement unlawful but the testing program lawful under *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

On appeal to this Court, the finding that the testing program was lawful was vacated and the question was remanded for further consideration. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). The district court's findings that the high school diploma requirement, recruiting and hiring practices, and the seniority system were unlawful were affirmed, but the district court was instructed that if the testing procedures were found to be unlawful, the class entitled to seniority relief should be expanded. Following our earlier case of *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970), this Court held that if the seniority system operated to lock in the effects of past discrimination, it would be subject to judicial alteration so as to permit victims of discrimination to move into their "rightful place."

Following remand to the district court, the parties agreed in 1974 to a consent decree. *United States* v. *Georgia Power Co.*, 7 Empl.Prac.Dec. ¶ 9167 (N.D.Ga. 1974). The decree enjoined Georgia Power from using any unvalidated aptitude test in employment decisions. Among other relief granted, the decree ordered that affected class members would use their total time with the company for competitive seniority purposes rather than their time in a particular seniority unit, as the

collective bargaining agreement required. The affected class was broadened to include all black Laborers hired before that job classification was made a part of previously all-white lines of progression in 1969 and all Laborers hired from 1969 to 1973 who were prevented from progressing within those lines of progression because of the unlawful testing and education requirements; all black employees hired before 1973 and assigned to the Janitor, Porter, or Maid classifications or other all-black jobs not connected with any lines of progression; and black applicants who were not hired on account of racial discrimination. No appeal was taken from the decree and the district court retained continuing jurisdiction of the case for the purpose of enforcing or clarifying its orders.

Then in 1977, the Supreme Court ruled that in the absence of purposeful discrimination, a bona fide seniority system may not be attacked as violating Title VII, even if it perpetuates the effects of past discrimination. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 324, 97 S.Ct. at 1843; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81-82, 97 S.Ct. 2264, 2275, 53 L.Ed.2d 113 (1977).

Thereafter, Local 84 moved to modify the decree so as to reactivate the collective bargaining agreement's seniority system as it was before alteration by the 1974 decree. The union contended that since the interpretation of Title VII underpinning the court's seniority decree had been invalidated in *Teamsters*, it was inequitable to enforce that decree. The United States opposed the modification on two grounds: that *Teamsters* did not require retroactive modification of existing decrees; and that the seniority system was not bona fide and thus did not come within the *Teamsters* rule. The court responded first,

that its relief was merely prospective, *i.e.*, that the modification would not affect any rights secured during the pendency of the decree but would have prospective effect only; and second, there was no evidence before it indicating that the seniority arrangement was not bona fide within the meaning of Title VII.

The motion to modify the decree was granted in part. Relying on *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), the court continued the seniority remedy as to those applicants who had wrongfully not been hired. As to the other classes of employees, however, the court vacated that portion of the decree giving them the right to use time with the company for seniority purposes rather than time in the seniority unit. Subsequent motions by the Government and private plaintiffs to reconsider were denied and this appeal was taken from that denial.

Because we reverse the district court on the ground that *Teamsters* did not justify modification of the decree, it is probably not necessary to discuss whether the court otherwise had the power to modify its earlier final decree. A short examination of that question may be in order, however, because the point is asserted on this appeal and if the court had no such power, we would never reach the issue concerning *Teamsters*.

The power of a court of equity to modify the prospective effect of its decrees in response to changed circumstances is "inherent in the jurisdiction of the chancery," *United States* v. *Swift & Co.*, 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932), and is so well settled as not to require extensive discussion. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855); *Bros. Incorporated* v. *W. E. Grace Manufacturing Co.*, 320 F.2d 594 (5th Cir. 1963). Recognition

of this power is found in Fed.R.Civ.P. 60(b)(5), which permits such modification upon a motion brought within a reasonable time when the district court is convinced "it is no longer equitable that the judgment should have prospective application."

Admittedly the only change after the 1974 decree which could arguably make it inequitable for the judgment to have prospective effect was the decision in *Teamsters*. As to whether a change in decisional law alone is sufficient ground for a Rule 60(b)(5) modification, there is a great deal of inconsistency among and even within the various circuits. For example, the First Circuit specifically held in *Theriault* v. *Smith*, 523 F.2d 601 (1st Cir. 1975), that when a definitive Supreme Court decision represents a fundamental change in the legal predicates of a consent decree, that presents the kind of situation in which prospective relief should be available under Rule 60(b)(5). A district court's order vacating a consent decree was affirmed. In *Lubben* v. *Selective Service System*, 453 F.2d 645 (1st Cir. 1972), however, the same court stated that "a change in applicable law does not provide sufficient basis for relief under Rule 60(b)(5)." *Id.* at 650. Similar contradictions can be found in the case law of several circuits. In the Third Circuit, compare *Jordan* v. *Erie School District*, 548 F.2d 117 (3d Cir. 1977) (Supreme Court's opinion in *Goss* v. *Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), justified modification in consent decree) with *Mayberry* v. *Maroney*, 558 F.2d 1159 (3d Cir. 1977) ("[I]t is settled that Rule 60(b)(5) does not contemplate relief based merely upon precedential evolution." *Id.* at 1164). In the Seventh Circuit, compare *Western Union Telegraph Co.* v. *International Brotherhood of Electrical Workers, Local No. 134*, 133 F.2d 955 (7th Cir. 1943), with *De Filippis* v. *United States*, 567 F.2d 341 (7th Cir. 1977). In the Ninth Circuit, compare *Safe Flight Instrument Corp.* v. *United Control Corp.*, 576 F.2d 1340 (9th Cir.

1978), with *Title* v. *United States*, 263 F.2d 28 (9th Cir.), *cert. denied*, 359 U.S. 989, 79 S.Ct. 1118, 3 L.Ed.2d 978 (1959).

While the Supreme Court has not spoken definitively on the subject, there are strong indications in at least two of its opinions that an injunction may be modified on the basis of a change in the case law. The Court held in *System Federation No. 91* v. *Wright*, 364 U.S. at 642, 81 S.Ct. at 368, that a district court "cannot be required to disregard significant changes in law or fact if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.' " 364 U.S. at 647, 81 S.Ct. at 371, *quoting United States* v. *Swift & Co.*, 286 U.S. at 114-15, 52 S.Ct. at 462. *System Federation* involved a change in statutory law, but the Court did say in dictum that "[t]here are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction. [Citations]." 364 U.S. at 650 n. 6, 81 S.Ct. at 372 n. 6. In *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), the Court was confronted with the refusal of a district court to modify its earlier injunction. The terms of the injunction were inconsistent with the intervening ruling in *Swann* v. *Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and were also ambiguous. Because of these two factors, the Court held, it was an abuse of discretion for the district court *not* to modify its earlier injunction.

The principal case in this Circuit is *Elgin National Watch Co.* v. *Barrett*, 213 F.2d 776 (5th Cir. 1954). In that case, on the basis of the interpretation of the Fair Trade Act announced in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951), the district court vacated the injunction it had entered almost three years earlier and dismissed the original complaint upon which the final decree of

injunction had been entered. This Court held that because the original judgment had not been appealed, it was improper for the district court to vacate the final judgment. This Court affirmed, however, as to the dissolution of the prospective operation of the permanent injunction, stating that such a modification was within the discretion of the trial court and, if consistent with accepted legal principles, would not be disturbed on appeal except for abuse of discretion. 213 F.2d at 780. Under the *Barrett* holding and in view of the Supreme Court authority cited above, we conclude that in this Circuit, given otherwise appropriate circumstances, a significant modification in decisional law will permit the district court in its sound discretion to prospectively modify a permanent injunction under Rule 60(b)(5). In a case very similar to this one, the Fourth Circuit sitting *en banc* recently concluded that the Supreme Court's decision in *Teamsters* permitted the modification of an earlier injunctive decree. *Patterson* v. *American Tobacco Co.* — —F.2d —— (4th Cir. 1980) (*en banc*) [Nos. 78-1083 & 1084 Nov. 18, 1980].

When an injunction is modified on the basis of an intervening change in decisional law, that modification must be justified by the new decision. We observe, as did the Tenth Circuit in an analogous situation in *EEOC* v. *Safeway Stores, Inc.*, 611 F.2d 795, 801 (10th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 2918, 64 L.Ed.2d 809 (1980), that "*Teamsters* prohibits abrogation of a seniority system only if that system is bona fide." Thus, *Teamsters* would justify the district court's discretionary modification of the earlier decree only if the seniority system came within the statutory definition of bona fide. *See Patterson* v. *American Tobacco Co.*, —— F.2d at ——. If the seniority system was not bona fide, however, the previously invalidated system would not be protected under section 703(h) and *Teamsters*, *see Pettway* v. *American Cast Iron Pipe Co.*, 576

F.2d 1157, 1189 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979), and accordingly it would be error for the district court to modify its decree on the basis of *Teamsters*.

Thus, we must examine whether the district court was correct in its conclusion that the seniority system modified by the 1974 decree was bona fide when tested against the precedents of this Circuit. Since the disposition of this appeal turns on our resolution of this issue, we need not resolve the potential conflict over whether the modification in fact had only a prospective effect.

The key to the bona fides of a seniority system that may have a discriminatory effect is the absence of purposeful discrimination. In a case decided after the Supreme Court decision in *Teamsters*, *James* v. *Stockham Vales & Fitting Co.*, 559 F.2d 310, 351 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978), we held "the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide." *See Southbridge Plastics Division* v. *Local 759, International Union of Rubber Workers*, 565 F.2d 913, 915 (5th Cir. 1978). To determine whether there has been purposeful discrimination, the court should examine the totality of the circumstances surrounding the seniority system, with particular emphasis on four factors the *James* court culled from the Supreme Court's analysis in *Teamsters*. *Swint* v. *Pullman-Standard*, 624 F.2d 525, 530-34 (5th Cir. 1980). These factors include: whether the seniority system operates to discourage all employees equally from transferring between seniority units; whether the seniority units are in separate bargaining units and, if so, whether that structure is rational and in conformance with industry practice; whether the seniority system had its genesis in racial discrimination;

and whether the system was negotiated and has been maintained free from any illegal purpose. *James* v. *Stockham Valves & Fitting Co.*, 559 F.2d at 352. Other factors may of course be considered. *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d at 1192.

In modifying its decree in this case, the district court responded to the Government's contention that the system here was not bona fide by noting that the system was facially neutral and then holding:

> There is no evidence before the Court indicating that the seniority [system] provided for the collective bargaining agreement between the Company and Local 84 is not "bona fide" as that term is used in section 703(h). Indeed, the Court notes that the system agreed to by the Company and Local 84 is not untypical of those negotiated through collective bargaining.

From the court's terse treatment of the issue, it is apparent that it overlooked a number of findings made in the 1971 and 1974 decrees. Although the question whether the seniority system was bona fide was not legally relevant then, an examination of those findings in light of the factors in *James* demonstrates that this system could not be found to be bona fide within the meaning of section 703(h) of Title VII.

Plaintiffs argue that a seniority system may be found non-bona fide on the basis of only one of the four *James* factors, *citing Sears* v. *Atchison, Topeka & Santa Fe Railway Co.*, 454 F.Supp. 158, 179 (D.Kan.1978); *Chrapliwy* v. *Uniroyal Inc.*, 15 Empl.Prac.Dec. ¶ 7933, at 6662 (N.D.Ind.1977). The issue under *James* and our subsequent decisions, however, is whether the *totality* of the circumstances demonstrates purposeful discrimination. Since we find that the Georgia Power seniority system does not pass muster under any of the four

James factors and the totality approach, we need not and do not reach the issue whether purposeful discrimination can be demonstrated on the basis of only one of the four factors.

Did the seniority system operate to discourage all employees equally from transferring between seniority units? Any employee transferring between seniority units at Georgia Power lost all seniority rights, regardless of his race. Therefore, on its face, the seniority system operated equally upon all employees. This facial equality, however, was but a mask for the gross inequality beneath. As shown in the findings of fact, until January 16, 1970, only five black employees had ever been initially assigned to jobs higher than that of Laborer, Janitor, Porter, Coal Sampler, Switcher, or Maid. As of that same date, no whites had ever worked as Janitors, Porters, Coal Samplers, or Maids, and since the Laborer classification had been changed from an all-black job in 1963, only 58 whites had ever been assigned to that classification. Consequently, unlike in *Teamsters* where those discouraged from transferring to line-driver jobs were not predominantly members of minority groups, 431 U.S. at 355-56, 97 S.Ct. at 1864-65, here the overwhelming majority of employees discouraged by a total loss of seniority from transferring to the better-paying, more desirable jobs were black. In this way, the seniority system operated to "lock" black workers into inferior jobs. This penalty was compounded by the fact that blacks could not progress except by forfeiting their seniority. As this Court stated in the earlier appeal of this case:

> [B]lacks ran a greater risk than whites of losing their jobs if they wished to advance within the company. Since there were no higher jobs in the "lines of progression" into which blacks were hired, any transfer from one of the four entry-level jobs could prove lethal.

United States v. *Georgia Power Co.*, 474 F.2d at 926. It is thus apparent that in discouraging transfers between seniority units, the seniority system here did not operate equally on the races but had a disproportionately heavy negative impact on blacks.

Were the seniority units in separate bargaining units and if so, was that structure rational and in conformance with industry practice? One of the factors that led the Court in *Teamsters* to conclude the seniority system there was bona fide was that the separate seniority units were in separate bargaining units and the creation of separate bargaining units was consistent with National Labor Relations Board precedent and industry practice. 431 U.S. at 356, 91 S.Ct. at 1865. *Cf. Swint* v. *Pullman-Standard*, 624 F.2d at 532-33 (where separate bargaining units are inconsistent with industry practice and NLRB precedent, separate seniority units may be evidence of purposeful discrimination). Such an argument is unavailing here. The record shows that while at the time of trial there were separate locals divided along geographical lines, these locals each represented all union members of every job classification in its geographical area and all bargained jointly and entered into a single contract with Georgia Power. The separate locals were later consolidated into a single local. Thus, for purposes of this inquiry, there were no separate bargaining units and the "black" seniority units were therefore part of the same bargaining unit as the "white" seniority units. Any unequal treatment caused by the seniority system cannot be explained by or attributed to the division of bargaining units.

Did the seniority system have its genesis in racial discrimination, and was the system negotiated and maintained free from any discriminatory purpose? The record shows that the seniority system had its genesis in an era of overt racial discrimination at Georgia Power, when

by formal policy blacks were prevented from holding any jobs other than those in the four lowest, most menial classifications. *Cf. Swint* v. *Pullman-Standard*, 624 F.2d at 530-31 (similar policies with respect to blacks). After formal segregation was officially ended, not only were these job classifications maintained as separate seniority units, but prior to 1969 these classifications were the only ones which were not connected to any line of progression. The "white" job classifications, on the other hand, were all part of lines of progression which permitted those employees to exercise their seniority to progress up the ladder. This structure, whites being able to progress without transferring but blacks being able to progress only by committing "seniority suicide" and transferring to another unit, *see James*, 559 F.2d at 348, effectively nullified any seniority acquired by black employees.

As minor improvements were made in ridding Georgia Power's job classification scheme of its strictly segregated character, similar improvements were reflected in changes in the seniority system. For example, as the Laborer classification was desegregated, its position in the seniority scheme was improved. Those classifications which remained strictly "black", however, continued to be segregated from the mainstream of the seniority system up until the court's decree. It can be clearly seen from the findings of the district court that the seniority system negotiated through the collective bargaining process tracked and reinforced the purposefully segregated job classification scheme maintained by the company and the conclusion is inescapable that the seniority system itself shared in that same unlawful purpose. The seniority system under the collective bargaining agreement was but part and parcel of the total package of purposeful discrimination at Georgia Power. Considering the totality of the circumstances surrounding the seniority system, as found by the district court after trial, we hold the

seniority system was not bona fide within the meaning of section 703(h).

Because the record contains positive findings that negate the bona fides of this seniority system, it is not necessary to remand the case to the district court for a decision on this point, as was required in *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d at 1192; *James* v. *Stockham Valves & Fitting Co.*, 559 F.2d at 353; and *Patterson* v. *American Tobacco Co.*, —— F.2d at ——.

Local 84 argues that a statement in the district court's 1971 order requires a finding that the seniority system was bona fide. After the district court had declared unlawful the seniority system, the company's hiring practices, and its educational requirements, the court considered what it called "Complaints of general discriminatory patterns and practices by the Unions." In denying additional relief against the unions, the court stated:

> While no showing of any conscious intent has been made, as part and parcel of the scheme of job seniority which has resulted in racial discrimination to certain black employees as discussed in Part I, *supra*, and permitted the educational qualifications discussed in Part II, *supra*, each union is a proper party to suit and the relief granted in this respect. [Citations]. Otherwise, there is no evidence of any discrimination by the defendant unions and further relief is denied.

The union interprets this statement to mean that "the district court expressly found that the seniority system at Georgia Power was not established or maintained with an intent to discriminate," and argues that this conclusion precludes a finding that the seniority system was not bona fide. Appellee union's brief at 14. We disagree. A failure to show conscious intent to discriminate does not preclude a finding of discriminatory purpose.

The Supreme Court observed in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977), that when "a clear pattern, unexplainable on grounds other than race, emerges from the effect" of the action even though the action "appears neutral on its face," it is then "relatively easy" to determine that a discriminatory purpose was a motivating factor. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). *See also United States* v. *Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977), *rehearing denied*, 579 F.2d 910 (1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed. 2d 879 (1979). The clear pattern here is unexplainable on grounds other than race. Both the union and the company were found to have been aware of the discriminatory impact of the seniority system. In view of this awareness, the 1971 and 1974 findings of the district court clearly show the seniority system here was the result of purposeful discrimination. The district court's statement that "[o]therwise, there is no evidence of any discrimination by the defendant unions" refers not to the establishment and maintenance of the seniority system but rather to the court's earlier finding that there was no showing that the unions had discriminated in processing grievances or complaints.

Both parties cite the recent case of *Smith* v. *Missouri Pacific Railroad*, 615 F.2d 683 (5th Cir. 1980), as supporting their respective positions. In *Smith*, white employees who had earlier declined to intervene in a settlement decree modifying the employer's seniority system sought, some two years after the final decree, to intervene and have the court set aside its final order on the ground that *Teamsters* had modified or overruled the case law upon which the order was based. The district court refused to permit them to intervene by way of Rule 60(b) motion. This Court affirmed, holding that resolution of either a Rule 60(b) motion for post-judgment

relief or a Rule 24(a) motion to intervene was within the sound discretion of the trial judge and that the district court did not err under either of those rules. The *Smith* holding supports the union's position that Rule 60(b) motions are discretionary. The opinion, however, does not specifically address the Government's contention in this case that the Supreme Court's decision in *Teamsters* would not justify a modification of a final decree in an appropriate case.

The seniority system at Georgia Power was not bona fide within the meaning of section 703(h) of Title VII and therefore does not come within the *Teamsters* holding. For that reason, it was not within the discretion of the district court to modify its earlier injunction on the basis of the *Teamsters* holding. We vacate the order modifying the original injunction and remand with directions to reinstate the 1974 decree with respect to the seniority system.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 12355

UNITED STATES OF AMERICA,
Plaintiff,

v.

GEORGIA POWER COMPANY, *et al.*,
Defendants.

Civil Action Number 11723

CHARLES KING, *et al.*,
Plaintiffs,

v.

GEORGIA POWER COMPANY, *et al.*,
Defendants.

Civil Action Number 12185

WILLIE C. MOREMAN,
Plaintiffs,

v.

GEORGIA POWER COMPANY, *et al.*,
Defendants.

ORDER

In this consolidated civil rights action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e, *et seq.*, there is presently in effect an Amended and Final Decree, entered January 31, 1974, ("Decree") over which this Court has continuing jurisdiction. On May 16, 1979, the Decree was amended, in light of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) ("Teamsters"),[1] *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), and *TransWorld Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), by the vacation of sections A, B, C and E of paragraph III. These sections of paragraph III provided that in competition with respect to those conditions of employment for which seniority is a factor, company seniority, rather than the seniority system of the collective bargaining agreement, would apply whenever an affected class member is involved. Thus, by vacating those sections of paragraph III, the Court sought to conform the Decree to the present state of the law. This conformation was expressly prospective in effect and was not to result in the re-evaluation of present conditions of employment based on seniority, but merely to permit the seniority system of the collective bargaining agreement to apply in future evaluations. To reiterate, the vacation of sections A, B, C and E of paragraph III did not relate back in effect and the Court's Order of May 16, 1979, should not be read or interpreted in that manner. As stated in that Order, no question of retroactivity was presented.

Presently pending are the motions of the United States and the individual plaintiffs to alter or amend the Court's Order of May 16, 1979, so as to reinstate the vacated sections of paragraph III. In the alternative, the United States, as plaintiff, seeks the grant of remedial seniority relief to the members of Affected Class I back to July 2, 1965, the effective date of the Act.

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[1] In *Teamsters*, the Supreme Court held that bona fide seniority systems were protected under section 703(h) of Title VII, 42 U.S.C. § 2000e-2h, even if they might perpetuate the effects of past discrimination. 431 U.S. 324, 354 (1977).

The private plaintiffs were not served with any of the papers filed in connection with the motion of defendant Local 84 of the International Brotherhood of Electrical Workers (AFL-CIO) ("Local 84"), which motion led to the Order now under reconsideration. However, in bringing to the Court's attention this serious breach of FED. R. CIV. P. 5, the private plaintiffs have not alleged or shown any actual harm resulting from the entry of this Court's Order of May 16, 1979. The Court finds, in the absence of any actual prejudice, no basis for vacating its Order entirely. Under the circumstances it should be appropriate merely to reconsider the Court's Order in light of the private plaintiffs' present arguments.

The private plaintiffs present three arguments for the Court's consideration: (1) that this Court has jurisdiction under 42 U.S.C. § 1981 to provide injunctive relief for violations of the sort here involved; (2) that reliance on § 703(h) of Title VII is in the nature of an affirmative defense, which, as such, has been waived by the defendants in this action; and (3) that the private plaintiffs are entitled to discovery of the defendants for the purpose of testing whether the seniority system of the collective bargaining agreement is bona fide.

Having considered each of the private plaintiffs' arguments in turn, the Court finds Local 84's responses to the arguments dispositive. The Fifth Circuit has determined that seniority systems protected by § 703(h) of Title VII may not be challenged under 42 U.S.C. § 1981. *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92 5th Cir. 1978) (fn.37). With respect to private plaintiffs' waiver of defense argument, Local 84 correctly points out that the Court was here dealing with the issue not of liability, but of appropriate equitable relief. Finally, the Court found on the basis of facial neutrality and the lack of evidence that the collectively bargained for seniority system was not bona fide, *i.e.*, did not apply

equally to all races and ethnic groups, *Teamsters*, 431 U.S. 324, 355 (1977), that the collectively bargained for seniority system was protected by Title VII and should be reactivated in light of the *Teamsters* decision. As pointed out by Local 84, the character of the collectively bargained for seniority system was put in issue at the consolidated trial of this action. The Court deems it inappropriate to open discovery on this point at this time.

United States, as plaintiff, argues that *Teamsters* does not entail a broad scale review and revision of existing seniority decrees. This Court agrees and hopefully the Court's initial discussion of its May 16, 1979 Order will dispel plaintiff's fears. In all fairness to the United States, the Court did use the word "rescission" in its earlier order vacating certain sections of the Degree. To the extent that "rescission", in any of its various forms, implies any retroactive effect from this Court's Order of May 16, 1979, it should be disregarded.

United States, as plaintiff, alternatively seeks remedial seniority relief for the incumbent black employees of Georgia Power Company who are members of "Affected Class I" as defined in paragraph I of the Decree.[2] Such

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[2] Affected Class I shall include all incumbent black employees hired prior to April 1, 1973, who were initially assigned to the traditionally black or segregated jobs of janitor, porter, maid, store clerk, switchman, coal sampler, and mail clerk; and it shall also include:

(1) All incumbent black employees who were initially hired into laborer jobs prior to April 29, 1969;

(2) All incumbent black employees who were initially hired between April 29, 1969, and April 1, 1973, into laborer jobs in the Building Service and Maintenance Section; and

(3) All incumbent black employees who were initially hired into a laborer job which was, as of April 29, 1969, connected with a traditionally white-only line of progression; who:

[Footnote continued on page 22a]

relief, it is contended by the United States, is mandated by the *Teamsters* decision. The Court hereby requests that the parties file briefs with respect to the appropriateness of remedial seniority relief back to the effective date of the Act for every member of Affected Class I. Specifically, the Court requests argument on the necessity of such relief in light of this Court's clarification of the prospectivity of its Order of May 16, 1979, and the appropriateness of class-wide relief under the instant circumstances. The Court further requests recommended procedures for determining individual relief should class-wide relief be deemed inappropriate in light of *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977) and *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978).

ACCORDINGLY, the motion of the private plaintiffs to alter or amend this Court's Order of May 16, 1979, is DENIED; the motion of the United States to alter or amend this Court's Order of May 16, 1979, is TAKEN UNDER ADVISEMENT pending the submission of the briefs requested by the Court. Such briefs should be submitted within twenty days from the filing date of this order. The Clerk of the Court is directed to submit this action thirty days from the filing date of this order.

SO ORDERED, this the 28th day of September, 1979.

/s/ Harold S. Murphy
United States District Judge

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[2] [Continued]

(a) do not possess a high school diploma or its equivalent and/or who did not successfully pass the Company's aptitude test, and;

(b) who have been denied job assignments, promotions, or transfers, or who have been excluded from consideration for such assignments, promotions, or transfers, because of either of these factors.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 12355

UNITED STATES OF AMERICA,
Plaintiff

v.

GEORGIA POWER COMPANY, a corporation, *et al.*,
Defendants

ORDER

This civil rights action was initiated on January 10, 1969, by the United States Attorney General pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The action was consolidated with two actions by private litigants (Civil Action Nos. 11723 and 12185) for trial purposes. The district court's original decision was appealed to the Fifth Circuit Court of Appeals which vacated portions of the decision and remanded the action for further proceedings. *United States* v. *Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973). As a result of the Fifth Circuit's ruling, the district court issued an Amended and Final Decree on January 31, 1974 [Hereinafter the "Decree"], enjoining various acts of discrimination, providing relief for several classes of discriminatees, and retaining jurisdiction for the purpose of any additional proceedings or subsequent grievances. Under this Court's continuing jurisdiction, there are several matters presently pending to which we now turn.

1. Paragraph III of the Decree was directed toward alleviating the effects of past discrimination in the promotion policies of the Georgia Power Company [Hereinafter the "Company"]. In an attempt to foster minority participation in all phases of the Company's work, Paragraph III provided for a modification of the seniority provisions of the collective bargaining agreement entered into between the Company and defendant Local 84 of the International Brotherhood of Electrical Workers (AFL-CIO) [Hereinafter "Local 84"]. Paragraph III of the decree, as amended by the addition of Section G,[1] provides that in competition regarding those conditions of employment for which seniority is a factor, company seniority will apply wherever an affected class member is involved. Paragraph III precludes application of the seniority system of the collective bargaining agreement, which called for bargaining unit seniority to apply in competitive bidding.

Local 84 has moved to modify the Decree to allow the collectively bargained for seniority system to apply in the same way to all members of any bargaining unit at the Company. Local 84 contends, and the Court has little doubt, that the injunction regarding seniority at the Company was based on the theory that seniority systems which perpetuate the effects of past discrimination violate Title VII regardless of their facial neutrality. *United States* v. *Georgia Power Company*, 3 FEP Case 767, 784 (N.D. Ga. 1971), 474 F.2d 906, 927 (5th Cir. 1973). At the time of the Decree such a theory was clearly prevailing in the Fifth Circuit. See, *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973). However, in 1977, the United States Supreme Court ruled that this theory was not a proper interpretation of Title VII. *International Brother-*

[1] See this Court's order of November 4, 1977.

hood of Teamsters, 431 U.S. 324 (1977) [Hereinafter "*Teamsters*"]; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977) [Hereinafter "*Evans*"]; *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977) [Hereinafter "*Hardison*]. Relying on section 703(h) of Title VII, 42 U.S. § 2000e-2h, the Supreme Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Teamsters* at 354. The Court made a similar ruling with respect to perpetuation of post-Act discrimination. *Id.* at n. 30. While this Court has carefully considered the narrow interpretation of the Supreme Court's trilogy propounded by the non-movants, we are forced to agree with the Fifth Circuit's conclusion in *Myers* v. *Gilman Paper Corp.*, 556 F.2d 758, 760 (5th Cir. 1977):

> The principal import of those decisions for this case is the holding that "bona fide" seniority systems, that is systems which are facially neutral, which did not have their genesis in racial discrimination, and which were negotiated and have been maintained free from any illegal purpose, do not violate Title VII even though they perpetuate the effects of an employer's discrimination.

See also, *Southbridge Plastics Division, Etc.* v. *Local 759, Etc.*, 565 F.2d 913 (5th Cir. 1978).

The non-movants contend that the Supreme Court's rulings do not require retroactive application. However, the motion for modification by Local 84 does not seek retroactive application. Rather it seeks a present modification of the Decree. That is the defendant is not seeking rescission of any employment decisions based on the Decree's seniority system, but a modification allowing the collective bargaining agreement's seniority system to reactivate. Thus, no question of retroactivity is presented

to the Court. But see, *EEOC* v. *Bethlehem Steel Corp.*, 16 EPD § 8245 (W.D.N.Y. 1978).

The non-movants next contend that the Court, pursuant to its equitable power, should refrain from modifying the Decree because it would require amendment of the affirmative action goals negotiated in consideration of the seniority system imposed upon the parties. Whether or not the affirmative action goals were determined in the context of a modified seniority system cannot dissuade this Court from following the clear directions of the United States Supreme Court. It should also be noted that the affirmative action goals alluded to have recently been amended by the Court, at the request of the parties.[2] Obviously inability to reach those amended goals should not bar the requested modification.

Finally, the non-movants contend that section 703(h) does not grant immunity to all seniority systems, but only those which are "bona fide". A "bona fide" seniority system is one which is negotiated and maintained without a discriminatory purpose. *Southbridge Plastics Division, Etc.* v. *Local 759, Etc.*, 565 F.2d at 915 (5th Cir, 1978). In arguing that the seniority system in dispute is not immunized by section 703(h), the Government points to the discriminatory hiring practices of the Company and the perpetuation of this discrimination through the seniority system. This is not enough to show that the seniority system had "a genesis in racial discrimination." *Myers*, supra at 760. The Supreme Court in *Teamsters* rejected the argument that a seniority system which perpetuated past discrimination could not be "bona fide." To so hold the Court said, "would be a perversion of the congressional purpose." *Teamsters* at 353. There is no evidence before the Court indicating that the seniority provided for in the collective bargaining agreement between the

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[2] See this Court's order of July 7, 1978.

Company and Local 84 is not "bona fide" as that term is used in section 703(h). Indeed, the Court notes that the system agreed to by the Company and Local 84 is not untypical of those negotiated through collective bargaining.

While the trilogy of cases beginning with *Teamsters* significantly changed the law in this Circuit, it did not reverse the Supreme Court's holding in *Franks* v. *Bowman*, 424 U.S. 747 (1976) [Hereinafter "*Franks*"]. Rather than reversing *Franks*, the Court distinguished the circumstances of the three cases. Indeed, the Court reiterated *Franks*' holding, "that § 703(h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination." *Teamsters* at 346.

The language of the *Franks* holding defining the purpose and scope of section 703(h) has been reaffirmed by the Supreme Court in *Teamsters*, *Hardison*, and *Evans*. The Court in *Franks* stated:

> [I]t is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case, a discriminatory refusal to hire.

Franks at 761-2. Therefore, this Court is free to grant relief, in the form of retroactive seniority, to those applicants who were discriminatorily refused employment after the effective date of the Civil Rights Act of 1964. This Court is not holding that the seniority system of the collective bargaining agreement is illegal. We hold that ret-

roactive seniority is an appropriate form of relief for affected class members victimized by post-Act discriminatory hiring practices of the Company.

In light of the above, the Court will grant in part Local 84's motion to amend the Amended and Final Decree of January 31, 1974, as amended by this Court's order of November 4, 1977. Section D of paragraph III, of the Decree deals with members of Affected Classes II, III and IV. Each of those classes is composed of job applicants who were discriminatorily denied employment after the effective date of the Civil Rights Act of 1964. As the law now stands, section D is a valid exercise of this Court's injunctive power and the relief granted therein shall continue. Sections F and G of paragraph III, as explanatory sections shall also remain in effect. However, sections A,B,C, and E of paragraph III of the Decree will be vacated and the injunctive relief declared therein is rescinded. The seniority system collectively bargained for by Local 84 and the Company may now be used to determine seniority for competitive bidding except as that system is modified by the remaining sections of paragraph III. Local 84 will not be dismissed as a party to this action, as requested, because of their integral involvement in all continuing aspects of this action.

2. Also pending before the Court is a motion to intervene by Bennie A. Rhodes and Willie E. Prather. The intervenors contend that they are black employees of the defendants who have been discriminated against in their employment in violation of the Decree. They seek injunctive relief, back pay and "front" pay for themselves and other persons similarly situated. The intervenors are also the plaintiffs in *Rhodes, et al.* v. *Georgia Power Company, et al.*, Civil Action No. 78-2028A (N.D. Ga.), which was filed against the present defendants on November 24, 1978. In both their complaint and the motion for intervention, Prather and Rhodes allege violations of

the Decree and seek enforcement of the Decree by the Court.

Paragraph IX of the Decree sets out the complaint procedure an employee questioning the interpretation or implementation of the Decree must follow to receive consideration of his objection. In the event that the matter cannot be resolved through the complaint procedure, counsel for the Government, Company or the private plaintiffs may "bring the matter" before the Court. The lack of a more detailed procedure for seeking judicial review has led to understandable confusion on the part of the intervenors. To resolve this matter, as well as future complaints, this Court will now set out, in detail, the procedures to be followed should an affected class member feel that the Decree has been violated.

In order to bring a grievance to the attention of the Court, the complaining employee should file a motion in the present action, that is Civil Action No. 12355. Filing a separate complaint will likely result in a dismissal as occurred today in *Rhodes, et al.* v. *Georgia Power Company, et al., id.* These instructions apply only to grievances arising out of the Decree entered in this action. The complainant's motion must be served on the Government, the Company and the Union involved or their counsel. The motion must be filed with an explanatory brief.

Before filing a motion, the complainant must completely exhaust the grievance procedure set out in Paragraph IX of the Decree. The motion must indicate that the grievance procedure has been exhausted and include supporting documents. Counsel for the Government or the grievant and the Company must be allowed a fair opportunity to resolve the dispute without judicial intervention, as provided for in the Decree. This Court will not serve as an alternative to the grievance procedures set out in the Decree. Therefore exhaustion of those procedures is a prerequisite to any consideration of the motion by the Court.

The complaining party must indicate that he or she is a member of the affected class and show to which class they belong. The motion should describe the grievance with particularity and set out the responses or actions taken as a result of the complaint procedures. The relief requested by the movant should also be specified. If the Company, Government, or Union wishes to respond to the motion, such response should be filed within fifteen (15) days of the date of filing of the motion.

In order that affected employees may be informed of these procedures, the Manager of the Employee Relations Department of the Company shall so inform the complaining party, at the same time he responds to the complaint as required by the Decree. Paragraph IX of the Decree is hereby amended to include the above described complaint procedures.

If the intervenors wish to complain to the Court, they must follow the above described procedures. The motion to intervene is denied.

3. The last motion pending before the Court is by Doris Baker, a member of the affected class of rejected applicants. The movant seeks an extension of the period of this Court's jurisdiction and an order requiring the Company to show cause for its failure to comply with the Decree as to her.

There is no need for Ms. Baker's motion for extension of jurisdiction for that has already been done in the Court's order of July 7, 1978. As to her request for a show cause order, the movant is instructed to comply with the terms of the procedures set out above. Although her motion is in partial compliance, she has not shown exhaustion of remedies, nor set out her grievance with particularity. For the present her motion will be denied, subject to future consideration upon her compliance with this order.

Accordingly, the motion for modification of the Amended and Final Decree of January 31, 1974, by defendant Local No. 84 is GRANTED, in part. The motion to dismiss Local No. 84 is DENIED. The motion to intervene is DENIED. The motion of Doris Baker is DENIED, subject to reconsideration. Section IX of the Decree is AMENDED as set forth above. The Clerk is instructed to note the complaint procedures set forth above.

SO ORDERED, this the 14th day of May, 1979.

/s/ Harold S. Murphy
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

Fifth Circuit

Nos. 71-3293, 71-3447

Feb. 14, 1973

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GEORGIA POWER COMPANY *et al.*,
Defendants-Appellees.

CHARLES KING *et al.*,
Plaintiffs-Appellants,

v.

GEORGIA POWER COMPANY *et al.*,
Defendants-Appellees.

As Amended on Denial of Rehearing
March 16, 1973.

Before TUTTLE, COLEMAN and CLARK, Circuit Judges.

TUTTLE, Circuit Judge:

This complex and multi-faceted employment discrimination case encompasses virtually every aspect of Georgia Power Company's hiring and promotion practices since July 2, 1965, the effective date of the Civil Rights Act of 1964. A "pattern or practice" suit and two private class actions, all brought under Title VII of the Act, were

consolidated for trial below.[1] Though the district court afforded some relief and recognized that many of the company's practices were prohibited under the Act, it is argued on appeal that the court's order did not go far enough. Plaintiffs appeal from (1) refusal to enjoin the company from administering employment aptitude tests which exclude blacks from promotion at a higher rate than whites, (2) denial of back pay to discriminatees, (3) inadequate remedies to compensate for hiring and recruitment policies favoring whites, (4) failure to award company seniority to all black discriminatees under the "rightful place" theory, and (5) granting insufficient attorney's fees to the lawyers in the private action. The company cross-appeals the court's order to discontinue the prerequisite of a high school education for all positions other than laborer.

Georgia Power, a company incorporated under the laws of the State of Georgia, engages in the production, transmission, distribution, and sale of electrical power. As of December 25, 1970, only 543 of the company's 7515 employees were black (7.2%) despite the existence of a large pool of black applicants for positions.[2] Until July

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[1] The Attorney General filed the pattern or practice suit under Section 707 of Title VII, 42 U.S.C. § 2000e-6, challenging the defendant's practices statewide. Though seven local unions of the IBEW were also joined as defendants, they are not parties to the aspects of the case before us on appeal. The named plaintiffs in the class action filed pursuant to 42 U.S.C. § 2000e-5 held laborer jobs at the time of suit and had been denied advancement to higher positions as a result of various practices of the company discussed infra.

[2] For example, 33% of the applicants of Plant Yates and Plant Harllee Branch from 1967-1969 were black and 70% of these had high school educations.

Many reasons for this statistical imbalance were fully aired at trial. Blacks applying for jobs other than traditionally black jobs (janitors, porters, maids and laborers) were regularly told, even

29, 1963, an open and unvarying policy of the company prevented black persons from competing for any but the most menial and low-paying jobs within the corporate structure. While blacks were classified exclusively as janitors, porters, maids, and laborers, almost all white employees occupied higher positions.

Though the formal prohibition of black advancement and transfer to traditionally white jobs was terminated in 1963, little statistical difference in job placements of blacks had occurred by January 10, 1969, when the Attorney General filed suit against Georgia Power. All ninety-five blacks hired during this period were initially assigned to the position of laborer, while 85% of the 627 whites hired in the steam plants, the general repair shop, and in the Atlanta and Macon Operating Divisions were assigned to entry-level jobs higher than laborer. Though whites hired as laborers have remained in that job an average of only three months and one week before promotion to higher paying jobs, blacks have remained laborers an average of two years and nine months before being promoted. While only one white hired during this period had *not* been promoted at the time of trial, only thirteen of the black laborers had been promoted.

Wholly aside from individual discriminatory practices, Georgia Power has adhered to two company-wide policies

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after this suit was filed, that there were no openings. When they were told no vacancies existed, blacks were often informed that they would be called if vacancies occurred. They were not called, however, and whites with no better qualifications were hired. Some blacks were told that certain jobs were filled from within when this was not the case. Others were offered only jobs well below those they were qualified to perform. In some instances, company supervisors failed to direct black applicants to hiring offices.

The district court enjoined such discriminatory hiring practices and awarded relief requiring the company to hire the qualified black applicants who had been rejected into the next openings at the company.

which have had the effect of barring more blacks than whites from employment with, and advancement within, the company. Beginning in 1960, all new employees were required to have high school diplomas or present evidence of equivalent educational accomplishment. From August 19, 1963 to date, all new employees have in addition been required to pass a battery of tests developed by the Psychological Corporation (a commercial organization not to be confused with the American Psychological Association).[3] Employees hired prior to the effective dates of each of these policies were allowed to remain with the company without complying with them. However, in 1964, the company *did* impose the high school education requirement on all incumbent employees seeking to transfer from the previously all-black positions of janitor, porter, and maid but *did not* add that prerequisite to transfers or advancements elsewhere in the company's structure. Finally, on November 19, 1964, the educational and testing requirements were suspended for hirees into the laborer classification *upon agreement by them not to progress further in the company without meeting them.*

THE TESTING REQUIREMENT

1. Legislation—Griggs

In Title VII of the Civil Rights Act of 1964 Congress expressly recognized testing as a permissible prerequisite to employment in this language:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results

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[3] The primary tests given were the Bennett Mechanical Comprehensive Test, the PTI Verbal and numerical tests, and the Wonderlic verbal, arithmetic, and clerical test. According to Georgia Power's expert, two of these tests demonstrated skill in Arithmetic, two measured Vocabulary, one measured ability to compare lists of figures and one tested for understanding of the laws of physics.

> of any professionally developed ability test *provided* that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. (Emphasis supplied.)
>
> Section 703(h).
>
> [42 U.S.C.A. § 2000e-2(h)]

In Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court held that the proviso of this section means that no test used for hiring or promotion is valid if it "operates to exclude Negroes [and] cannot be shown to be related to job performance." 401 U.S. at 431, 91 S.Ct. at 853. Reversing the Court of Appeals for the Fourth Circuit, the Court decided that a test which excludes proportionately more blacks than whites from employment or advancement may be prohibited under the Act despite a lack of any discriminatory intent on the part of those developing and using the tests and in spite of professional origins of the test. Whereas in *Griggs* the company made no effort to prove that its tests were related to job performance, the appellee here introduced a mass of statistical data (the Hite Study) by which it sought to prove "a *demonstrable relationship* between test scores and job performance." (emphasis added) On this appeal, we must resolve the question left unanswered by *Griggs*: what comprises an adequate demonstration that a company's testing program satisfies the proviso of § 2000e-2(h), as interpreted by *Griggs*?

Though employers need not give preference to victims of discrimination over other job applicants, practices "fair in form, but discriminatory in operation" are proscribed. 401 U.S. at 431, 91 S.Ct. at 853. When a series of tests operates to exclude more blacks than whites from employment, the burden is upon the employer to

prove the business necessity of the tests. If ". . . the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites . . ." and the test operates ". . . to disqualify Negroes at a substantially higher rate than white applicants," 401 U.S. at 426, 91 S. Ct. at 851, then the company's proof must make manifest a relationship between the test and the job for which its passage is prerequisite.

2. Test Evaluation

. *General Background.* At Georgia Power, tests were first used as a device for screening job applicants on August 19, 1963, less than one month after the discontinuation of formal job segregation. The tests were initiated without any *prior study* of their ability to predict likelihood of successful job performance, and the first formal attempt to validate them came shortly after the Attorney General's filing of this suit.[4]

Georgia Power acknowledged its *Griggs* burden to validate the tests it had used with such racially discriminatory results[5] and attempted to carry that burden

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[4] The Administrative Assistant to the Company's Industrial Relations Department Manager developed the testing program used here. He checked test results on the first year's hirees against supervisor's job performance ratings. As a result of this check, cut-off scores were adjusted—some up, some down. However, his testimony did not undertake to demonstrate any specific relationship between test scores and job performance.

[5] The district court found, in general, that black persons score significantly lower than do white persons on aptitude and intelligence tests of the type used by Georgia Power Company. Specifically the court found that black applicants' or employees' scores on the company test battery since 1968 averaged 9 to 12 points lower than white scores, and that the failure rate for blacks was more than thirty times higher than for whites. The court also found that at least sixty-five black employees had been denied promotion since January 1, 1967 for failure to pass these tests. Of the

with expert opinion evidence. This took the form of a post-testing study made by Dr. Loren Hite which concluded that, after each of the tests had been properly weighted for the jobs involved, the resulting scores bore a positive relationship to job performance ratings by supervisors. The major issue in this appeal is whether this proof met the standard articulated in *Griggs*.

At the outset of our decisional analysis we would note that testing is a relative concept. For Title VII purposes, a test is not valid or invalid *per se*, but must be evaluated in the setting in which it is used. As the Griggs Court said, "any tests used must measure the person for the job and not the person in the abstract." 401 U.S. at 436, 91 S.Ct. at 856. A test or other selection device may be shown to be "job-related" under *Griggs* only if the employer can demonstrate or manifest that the test reliably predicts which applicants possess the reasonably necessary job skills and traits.

The most accurate way to validate an employment test is to administer the test to be validated to all applicants but proceed to select new employees without regard for their test achievement, and then, after an appropriate period of work experience, compare job performance with test scores. Bernhardt, Griggs v. Duke Power Co.: the Implications for Private and Public Employers, 50 Tex. L.Rev. 901 at 904. An alternative is "concurrent validation", a process in which a representative sample of current employees is rated, then tested, and their scores are compared to their job ratings.

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24 black employees who were given the Bennett Mechanical Test at Georgia Power between January 1, 1968 and March 20, 1970, 9 or 37.5% failed; whereas, of the 588 whites who were tested, 5 or 0.85% failed. Similarly, 43% of the blacks failed the PTI-Numerical Test while 1.25% of the white employees failed; also, 30% of the blacks failed the PTI-Verbal Test while 0.94% of the whites failed.

In this case, Georgia Power's expert chose to conduct a validation study roughly following the second route. Dr. Hite requested evaluations by supervisors of employees who had earlier been hired on the basis of the tests to be validated, then he compared their test scores to their job ratings. He utilized a statistical validation procedure called the "discriminant function" method to determine whether or not the tests given predicted job success. While admitting that the relatively small numbers of people involved and the fact that the study group excluded the 40% of the applicants who failed the test created problems for him, Dr. Hite still was able to form the opinion that his validation analysis "did a pretty good job" of demonstrating a "positive relationship between job performance and test scores." He therefore concluded that, for the most part, the tests were valid indicators of job performance.[6] However, on cross-examination, Dr. Hite admitted that using American Psychological Association standards, as suggested by EEOC guidelines, and the commonly used "correlation analysis" method for validation, only *one* job classification was validly test-related, and twelve were definitely not valid.

Since Dr. Hite's study and his testimony were the only specific proof offered to uphold Georgia Power's tests, the district court necessarily based its validation findings on this evidence alone. The entire appellate testing attack focuses upon Dr. Hite's approaches and conclusions. Our evaluation of the evidentiary value of this study must begin with this guidance from *Griggs*:

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[6] The Hite Study states that the Bennett Mechanical Test is valid for 7 of 9 job classifications, that the PTI Verbal Test is valid for 4 of 8 classifications, and that the PTI Numerical is valid for 6 of 8 classifications. The tests could not be validated by Dr. Hite with reference to the jobs of switchboard operator (the top-paying job in the bargaining unit), garage mechanic, coal equipment operator or helpers. The SET Verbal test was found not to be a valid predictor for meter readers.

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests.[9] The administrative interpretation of the Act by the enforcing agency is entitled to great deference. See, *e.g.*, United States v. City of Chicago, 400 U.S. 8, 91 S.Ct. 18, 27 L.Ed.2d 9 (1970); Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); Power Reactor Development Co. v. Electricians, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.
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> [Footnote 9 refers both to the 1966 guidelines and to the "new guidelines"—29 C.F.R. Part 1607, 35 Fed.Reg. 12333 (Aug. 1, 1970)]

This requirement to treat the guidelines as expressing Congressional intent obviously was intended as an answer to the question at issue in *Griggs*—When can tests, which are shown to have discriminatory results, be used? We view the reference by the Griggs court to EEOC guidelines as an adjunct to the ultimate conclusion that such tests much be demonstrated to be job related. We do not read *Griggs* as requiring compliance by every employer with each technical form of validation procedure set out in 29 C.F.R., Part 1607. Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold they should be followed absent a showing that some cogent reason exists for noncompliance.

b. Differential Validity. The minimum standards recommended for validation strategy by EEOC guidelines [35 C.F.R. § 1607.5(b)] provide:

> (5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question.

Perhaps the most absolute bar to the action of the court below in accepting the work done by Dr. Hite as a final validation, particularly in view of our holding in United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), is the absence of any attempt to show that the tests did not screen out blacks as blacks.[7] The minimum is designed to safeguard the key guarantee which the guidelines and the Act intend to assure—that the benefit of employment is not denied to blacks by the apparent neutrality of a facially objective ability test. *Jacksonville Terminal* commits this circuit to this salient principle of test validation: "Accepting *arguendo* that whites scoring high on the test perform satisfactorily in Group 1 position [the best jobs], to conclude that therefore blacks scoring low could not adequately perform the same jobs as a *non sequitur* . . . Griggs demands more substantial proof, most often positive empirical evidence, of the relationship between test scores and job performance [by blacks]." 451 F.2d at 456. Although the significance of the concept of differential validity, viewed scientifically, is the subject of a consid-

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[7] This absence is closely related to the deficiency as to minimum (1) discussed below, since, as stated, the largest portion of the applicant group to which the test denied employment were blacks. *See* subpoint "d. Adequate Sample."

erable amount of professional debate,[8] the possible fair employment implications are so great as to require separate racial group validation of tests in a case such as we have here which there exists an available minority race sample of adequate size to conduct such a study. "Certainly the safest validation method is that which conforms with the EEOC Guidelines . . . ." *Id.*

This minimum guideline contains the very practical condition that tests may be found in provisional compliance and continued in use where differential validation is not technically feasible. To be entitled to continue a test in use pending final validation, the guide requires that an employer must show that the available professional literature substantially indicates validity[9] *and* that he has in progress validation procedures which are designed to produce the additional data required as soon as it is reasonably feasible to do so. The guidelines also

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[8] An American Psychological Association sanctioned report on this quest concluded:

> This hypothesis, that test scores have different meanings for different subgroups, requires extensive research for confirmation or rejection; existing evidence is inadequate to determine whether aptitude tests actually discriminate unfairly because of their different validities from one subgroup to another.

APA Task Force on Employment Testing of Minority Groups, Job Testing and the Disadvantaged, 24 Am.Psych. 637, 641 (1969). In addition, the APA in its amicus brief points out that the conclusion reached after an extensive six year study conducted jointly by the Educational Testing Services, Princeton, New Jersey, and the United States Civil Service Commission, was that where a differential validity study is not technically feasible, and where the tests have been chosen on the basis of a careful job analysis, a reliable relationship found for whites will usually hold true for blacks. *See* J. T. Campbell, An Investigation of Sources of Bias in Job Prediction (Educational Testing Service, Princeton, New Jersey, 1972). *See also* Developments in the Law—Title VII, Employment Discrimination, 84 Harv.L.Rev. 1109, 1129 (1971).

[9] See 29 C.F.R. § 1607.7.

anticipate that "the employer may have to alter or suspend test cut-off scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained." [29 C.F.R. § 1607.9] There was no evidence in this record that Georgia Power had ever attempted to satisfy these provisions. With an applicant population which is one-third black, no plausible reason now appears which would indicate that differential validation could not at least be tried by Georgia Power.[10]

c. The 95% Guideline. The one aspect of the EEOC guidelines which most troubled the district court was the requirement of demonstrating a 95% statistical significance to the test [29 C.F.R. & 1607.5(c)]. This guideline requires it be shown that there was no more than 1 chance out of 20 that job relatedness appeared by coincidence. The Hite Study showed varying levels of statistical significance. In the case of six jobs (apprentice mechanics, appliance servicemen, storekeepers, metermen, helpers, meter readers), it was approximately as likely that the results were arrived at purely by chance as that they were more scientifically validated. A statistical confidence of 95% was achieved for only two jobs under the Hite Study, and for one of those jobs (garage mechanics), the tests were rejected by the company for other reasons.

Were the only criterion of the validation procedures the fact that there was a significance factor of 1 out of

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[10] One defense raised by the company against compliance with this requirement for separate minority group validation—that "such a study was not attempted . . . because of the lack of Negroes in the sample group"—does not appear to be well founded. Rather, the record indicates that there are black employees already present in three of the job classifications in numbers as large as some of the all-white samples actually used in the Hite validation study. Had the company attempted separate validation in these jobs, even if such validation was not then feasible in other job categories, it could have generated at least some data which could indicate whether the tests had differential validity as to both races.

15 or even 1 out of 100 instead of 1 out of 20, the employer might have better standing to complain that the guideline is arbitrary. We agree with the lower court that this, as well as other guidelines, must not be interpreted or applied so rigidly as to cease functioning as a guide and become an absolute mandate or proscription. Thus, Section 1607.15(c) must be read as setting a desirable goal and not a prerequisite.[11] Conversely, the pure common sense of this guideline cannot be ignored. An analysis of the Hite Study did not develop just a slight discrepancy from the guideline goal. Rather, there were differences so great as to create a clear inference Dr. Hite's self-described artful "guess" at validation was the product of chance, not science.

d. Adequate Sample. The first minimum standard of Section 1607.5(b) states:

> (1) Where a validity study is conducted in which tests are administered to applicants, with criterion

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[11] The observation of the American Psychological Association in its amicus brief is again apt:

> In short, the 5% level is an arbitrary convention. It has never been a part of professional standards to insist on a specific level of confidence; however, when one departs from the conventional standard, he should ordinarily have a reason which can be stated in advance of the analysis. Under some circumstances, for example, one might need a prediction so badly or have such severely restricted range of scores on prediction or criterion that he will decide to accept any finding significant at the 10% level; under other circumstances, the cost of using a test that might later prove invalid may be so great that the investigator will insist on at least a 1% level.
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> * * * * *
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> Moreover, nothing either in professional practice or in the *Guidelines* suggests that a 6% level could not be accepted, at least tentatively, even where the *a priori* thinking anticipated requiring the 5% level. It is certainly preferable to use an employment procedure such as a test that is valid at the 6% level than to rely on an alternative approach to selection, such as an interview, which has not been validated at all.

> data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question.
>
> This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. . . . If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

In his testimony Dr. Hite complained of the lack of a representative sample of applicants in the data which he worked. Completely aside from the virtual absence of blacks in the sample, he noted that the absence of any evaluation of those who failed the tests caused statistical difficulties because he was cut back to the use of distributions which had about one-half the range of test manual norms. The lower 40% of the predicted bell-shaped curve of applicants (which lower range included the majority of the blacks tested) was never evaluated. Rather than attempting to supply this deficiency through ad hoc evaluation of probationary employees or the use of validity studies from other organizations with comparable jobs, as permitted by § 1606.7, Dr. Hite proceeded, as he described it, to "work under a tremendous handicap to get a significant correlation" despite the loss of the group he thought would give the mathematics of his correlation attempt a great boost.[12]

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[12] Dr. Hite did innovate at one point by supplementing the results from 50 test-passers who worked as auxiliary equipment operators with data acquired from 69 persons who had never taken the tests. The untested were tested and, upon whole group evaluation, a 99% validation figure resulted.

e. Test Conditions. Again referring to the minimum standards of Section 1607.5(b), we find:

> (2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures.

While the district court was able to conclude that testing of new applicants had been conducted under a uniform policy, it found that the testing of existing employees (including the bulk of the blacks involved) had not been uniform. Although the court found no racial discrimination in these testing procedural variances, it did conclude that a company-wide retesting had to be mandated. The Hite Study proceeded only on the data already in hand, which falls short of minimum (2), as well as being less than the court felt necessary to correct faulty conditions.

f. Irrelevance of the Hite Study. Even without regard to the guidelines, the Hite Study was not a proper way of determining whether these tests predicted job success because it did not validate the actual testing as used by the company. Comparing the Hite validation study to the actual testing procedures of the company is like comparing apples to oranges.

Rather than accepting the real Georgia Power procedures as his premises, Dr. Hite used a variation of a theoretical testing scheme under which the best total scorer would be hired. Instead of evaluating each three-test battery in terms of the cut-off score method used by the company, he multiplied each separate test score by some real number, either positive or negative, then he added these "adjusted" scores together to get a test evaluation figure. For example, he computed the total scores for storekeepers by adding 2.1614 times the numerical test score, 1.1090 times the mechanical test score, and

minus .11468 times the verbal score. Using these multiples, a score of 80-80-80 on the numerical mechanical, and verbal tests would be lower than a 90-80-60 score, though the straight point total would be 240 on the first battery and 230 on the second. The reason for the difference between the Hite result and the straight total, of course, is that Hite in effect gave double credit for numerical test scores and deducted points for high scoring on the verbal test.

There is nothing abstractly "wrong" about calculating a composite score by assigning different weights to the various tests in order to stress particular job qualifications. These weightings reflect the very reasonable probability that a shop-keeper needs to be better at adding figures than at parsing sentences. The point is that, while it would not necessarily be inappropriate to use the composite score technique as a tool for employee selection, it cannot be proper to use that as a basis for validating the requirement that an applicant or employee pass each of a battery of tests.

In this case Dr. Hite's weightings bear no relation to the actual test scoring procedures at Georgia Power. For example, had the company used the straight "highest scorer" formula, it would have chosen the 240 score over the 230 score and saddled itself with an employee Dr. Hite thought less likely to perform well as a storekeeper. In actual practice, Georgia Power followed *neither* the adjusted total nor the straight total method: it took no composite score at all, but required a pre-set passing score on *each* test by any applicant before he would be considered for employment. The following colloquy which took place on Dr. Hite's cross-examination tellingly illustrates this point:

> Q. Would it be safe, then, to say that the Company's method was less valid for determining anything [about job performance] than your method?

> A. I don't know that. I would guess so; I don't know that. I made no study on the Company's method whatsoever.

It is apparent that absolutely no relationship was demonstrated between successful job performance and the ability to achieve the Company-established cutoff score on each test in the battery.[13] In sum, the Hite Study validation is so wholly irrelevant to Georgia Power's actual test scoring techniques that it simply cannot demonstrate any business necessity for a testing program having the racially discriminatory effect on this one.

g. Conclusion. Not only was the Hite Study, as conducted, substantially at variance with the minimums of the EEOC validation guidelines recommended by *Griggs*, but, as significantly, its premises also departed from the practices followed by the company in the testing program as administered. For these reasons the study's final induction—a positive correlation of test results vis-a-vis job performance at Georgia Power—was invalid. We conclude that the district court erred as a matter of law in relying on the Hite Study to find that Georgia Power had met the burden of manifesting its tests were job related.

However, testing is an expressly approved employment practice under Title VII. It is an effective tool for employee selection "provided . . . it is not used to discriminate because of race . . . ." Moreover, standards for testing validity comprise a new and complicated area of the law. While the Hite Study did not demonstrate compliance with the Act, we hesitate to penalize this litigant, the first to confront such a demanding burden of proof, for failing to introduce a more rigorous study. Had our

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[13] Moreover, test score differences between high and low performance groups were often insignificant (e.g., for meter-readers the average SET-V score of low performers was 24.16 and for high performers 24.80).

standards been articulated at the time of trial, it may be that the company could have proven its compliance. Therefore, rather than now proscribing the testing program which Georgia Power has used, we remand this phase of the case to the trial court with directions to permit the company a reasonably prompt opportunity to validate the testing program applied to the plaintiffs, in acordance with the principles enunciated in this opinion.

THE HIGH SCHOOL DIPLOMA REQUIREMENT

Since we find that the company made no substantial showing that possession of a high school diploma is a business necessity at Georgia Power, we affirm the aspect of the district court's decision which strikes down the diploma requirement. As the Supreme Court noted in *Griggs:*

> History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality. [401 U.S. at 433, 91 S.Ct. at 854.

There, the court explicitly held that the use of a high school requirement which has a disproportionate racial impact and has not been proven to be a predictor of ultimate job success controverts the congressional mandate of Title VII.[14] As with Georgia Power's testing pro-

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[14] Such a requirement also runs afoul of the EEOC guidelines on Employees Selection Procedures, which define "test" to include ". . . specific educational . . . requirements . . ." and prohibit tests not supported by "empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job . . ." 29 C.F.R. § 1607.4(c).

gram, supra, the issue here is whether or not the company has made a sufficient showing to manifest a relationship between its educationl requirement and its job characteristics.

The requirement undoubtedly screens out blacks at a considerably higher rate than whites,[15] because in the 25-44 age group in the South, 64.7% of white males, 35% of black males, 63% of white females, and 34.7% of black females have completed high school. In the Atlanta area, statistics show that for males over 18 years of age, 70.7% of the whites had finished high school compared with only 46.2% of the blacks.

The justification offered at trial for the requirement was very weak. As the district court observed:

> At best, the only justification for this requirement is the obvious eventual need for above-average ability to read and comprehend the increasingly technical maintenance manuals, the training bulletins, operating instructions, forms and the like demanded by the sophisticated industry . . . . In such a context, the high school education requirement cannot be said to be reasonably related to job performance. This is not to say that such requirements are not desirable . . . it simply means that the "diploma test" cannot be used to measure the qualities. Many high school courses needed for a diploma (history, litera-

[15] In two respects, Georgia Power's high school requirement is even more stringent than the one disapproved at Duke Power. First, the lack of a high school education was never an absolute bar to the employment of all applicants at Duke Power as it was at Georgia Power from 1960-1964. Second, since September 1965, employees at Duke Power's Labor Department who lacked a high school education could transfer to better jobs upon passage of tests, for the high school and testing requirements were phrased in the alternative. Since 1964, the requirements for promotion at Georgia Power have been that the employee have a high school education *and* pass the tests.

> ture, physical education, etc.) are not necessary for these abilities. A new reading and comprehension test . . . might legitimately be used for this job need.

Many employees without high school diplomas have mastered the technical literature and many of the highest-ranking personnel in the company did not pass the "diploma test", including 47 of 100 foremen, supervisors, and chief division operators in the Atlanta and Macon operating division. Such a large percentage of current employees have succeeded at Georgia Power without a diploma that it simply cannot be "irrelevant", as the company urges, that some employees have successfully performed without possessing diplomas.

The rest of the data presented by the company is equally inconclusive. The proof that non-high school graduates have recently obtained fewer promotions than graduates is a *non sequitur* in light of the company's requirement for the paper qualification as a prerequisite for promotion out of laborer positions even for pre-1960 employees and in view of the fact that many of the older (pre-1960) employees not holding diplomas were already at the top of their lines of progression by 1960. Therefore, the court appropriately held that Georgia Power had not demonstrated a business necessity for requiring the diploma.

BACK PAY

1. Statutory Right

Although the district court awarded back pay to black employees who were named plaintiffs in two private suits consolidated with the Attorney General's pattern or practice suit, it held that back pay could not be awarded to the non-named members of the class in the private actions and that under no circumstances would the Attorney General be empowered under Section 707(a)

[42 U.S.C. § 2000e-6(a)] to sue for back pay on behalf of discriminatees. The major legal premise upon which the court based its refusal to consider back pay in the Attorney General's action was the difference between the wording of Section 706(g) [42 U.S.C. § 2000e-5(g)], authorizing private actions, which provides that: "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, *with or without back pay* . . ." (emphasis added); and Section 707(a), relating to actions by the Attorney General, which provides that he: "may bring a civil action . . . requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to ensure the full enjoyment of the rights herein described." The rationale was that since the private actions section explicitly provides for back pay and the Attorney General suit section makes no such mention of this remedy, Congress, by implication, meant to deny a court the right to award back pay in a pattern or practice suit by the Attorney General.

The court "moreover" held that the grant of back pay relief would constitute a bypass of Act-mandated EEOC processes for investigation and reconciliation. It also cited the lack of record proof needed to consider and apply the appropriate statute of limitations and to determine the existence of job openings and the qualification of claimants. Primarily because of its view of the law the district court concluded "that such relief is not authorized and, in the discretion of the court, certainly not demanded." The only relief granted as to this phase of the litigation was to confer preferential opportunities for [future] employment. Because we find that Congress did not intend to preclude such relief, because precedent in this circuit has contemplated the possibility of back pay

relief under this section, and because of the importance such relief may have in effectuating the policies upon which Title VII is based, we reverse and remand for further consideration of this issue.[16]

The legislative history of the Civil Rights Act of 1964 and Congress' recent additions to that legislation in the Equal Employment Opportunity Act of 1972 indicate that back-pay relief in a pattern or practice suit was not intended to be precluded by Congress. The legislation which became the Civil Rights Act of 1964 originated in the House of Representatives as H.R. 7152. When this bill was taken up by the Senate, the leadership of both parties agreed to an amendment in the nature of a substitute to circumvent the filibuster on H.R. 7152. This substitute bill ultimately became the Act, but since it was never considered in committee, its legislative history consists only of the debate on the floor. Section 707(b) of H.R. 7152 had authorized the EEOC to bring civil actions where it found reasonable cause to believe an unlawful employment practice had occurred or was occurring, and Section 707(e), the enforcement provision for both EEOC suits and private actions, provided:

> If the court finds that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practices, and shall order the respondent to take such affirmative action, including reinstatement or hiring of employees, with or without *back pay* . . . as may be appropriate. (emphasis added)

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[16] Since we hold that the Attorney General may sue for back pay on behalf of discriminatees and because the pattern or practice suit encompasses all the plaintiffs, both named and unnamed, in the private suits, we find it unnecessary to discuss the issue raised by the private class action appellants as to the availability of back pay to non-named class members in § 2000e-5(g) actions.

The Dirksen-Mansfield substitute removed any independent power of the EEOC to file suit, but in lieu of this remedy gave the Attorney General the authority to bring lawsuits where he believed there was a "pattern or practice" of employment discrimination.

The substitute for the original House Bill was not seen by either proponents or opponents as providing any less comprehensive relief in "pattern or practice" suits. "Such relief . . . as he (the Attorney General) deems necessary to ensure the full enjoyment of the rights herein described" contemplated no less than what was explicitly provided for in H.R. 7152. Senator Clark, who along with Senator Case was the floor manager for Title VII, saw as a "net gain" the fact that the substitute empowered the Attorney General to enforce fair employment practices.[17] It is unlikely that he would have responded so favorably to the substitute had he thought the remedies available to the Attorney General less adequate than those formerly available to the EEOC. Senator Holland, an opponent of the Bill, noted that the substitute merely removed the authority to file suit from the EEOC and gave it to the Attorney General.[18]

More recently, Congress has endorsed this view of the remedies available under Section 707(a). Under the amended Section 706 of the 1972 Act, both the Attorney General and the EEOC are empowered to bring civil actions on behalf of discriminatees and the classes they represent. Section 706(g) expressly empowers the courts to award back pay, and the new Sections 707(c) and (e) give the EEOC and the Attorney General concurrent power for the next two years to bring "pattern or practice" suits. We think it incongruous that Congress

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[17] 110 Cong.Rec. 12595. *See also* Senator Humphrey's remarks at 110 Cong.Rec. 12722.

[18] 110 Cong.Rec. 14220.

would have thought it appropriate to give the EEOC and the Attorney General authority to sue for back pay under Section 706 but not in cases involving the more serious Section 707 problems.

While back pay in "pattern or practice" situations does not appear to be a frequently litigated issue in the federal courts, there is precedent in this circuit which requires that we reverse this part of the judgment. In United States v. Hayes International Corp., 465 F.2d 112 (5th Cir. 1972), a suit by the Attorney General under Section 707, this court, reversing on other grounds, said:

> The back pay issue was not specifically raised until the post-trial stage of the litigation. The district court accordingly refused to entertain it. We think that the broad aims of Title VII require that this issue be developed and determined. It should be fully considered on remand. Fed.R.Civ.P. 15(a); see Rosen v. Public Service Electric and Gas Co., 3 Cir. 1969, 409 F.2d 775, 780 n.20.
>
> [456 F.2d at 121]

Though the court in Hayes did not expressly state that back pay is authorized, it would not have remanded the case for consideration of that claim had it believed that as a matter of law the courts have no jurisdiction to award back pay. What the remand order contemplated was full development of the extent of damages among discriminatees on whose behalf the Attorney General was seeking relief. It was implied that, as a matter of principle and Congressional intent, such relief was appropriate.

2. Equitable Discretion

Title VII was enacted with the legislative objective of disestablishing the racial and sexual caste systems which had remained ingrained in the American economy since slavery and coverture. The Act, in authorizing courts to grant equitable relief to those who might be injured

by its breach, expressly and impliedly includes the discretion to award back pay. Given this court's holding that "[a]n inextricable part of the restoration to prior [or lawful] status is the payment of back wages properly owing to the plaintiffs', Harkless v. Sweeney Independent School District, 427 F.2d 319, 324 (5th Cir. 1971), it becomes apparent that this form of relief may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks, not to punish the respondent but to compensate the victim of discrimination. *See* NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969); Oil, Chemical and Atomic Workers Inc. Union v. NLRB, Part III, 144 U.S.App.D.C. 167, 445 F.2d 237 (1971). *Cf.* Social Security Board v. Nierotko, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718 (1946).[19]

In LeBlanc v. Southern Bell Telephone & Telegraph Co., 460 F.2d 1228 (5th Cir. 1972), this court held that Title VII confers the discretion to award back pay upon the district court. The order appealed from here states that such discretion was exercised in favor of denying such awards in the case at bar except to certain of the named individual plaintiffs. However, since it is apparent that such discretion was exercised in whole or substantial part upon a view of the underlying law which we have determined to be erroneous, this court will vacate the resulting decree and remand for a reconsideration of this issue under the principles enunciated.

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[19] The relief provisions of Title VII were derived from a similar provision in the National Labor Relations Act, 29 U.S.C.A. § 160 (c). Monetary awards by the National Labor Relations Board under this authority have been based upon net back pay, and legislative history indicates that Congress felt that the Title VII remedy should be similar. 110 Cong.Rec. 6549 (1964); Developments—Title VII, *supra* note 8 at 1259 *n.* 349.

3. Method of Determination

The district court found that the proof established racially disproportionate earnings due to employment practices.[20] But this finding alone is not a proper premise for the making of a back pay award. Equity demands that the true balance of interests be struck. In Jinks v. Mays, 464 F.2d 1223, 1226 (5th Cir. 1972) after quoting Harkless, *supra*, the court put the rule thus:

> But, back wages are not to be automatically granted whenever a person is ordered reinstated. The wages sought must be "properly owing to the plaintiffs." This requires positive proof that plaintiff was ordinarily entitled to the wages in question and, being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed.

The trial court's decision must also include a weighing of issues as to limitations and laches (discussed more fully below), factors of economic reality (*i. e.*, the relative expense of accurate determination of individual rights vis-a-vis the amounts involved) and, most assuredly, the physical and fiscal limitations of the court to properly grant and supervise relief. This listing is intended to be illustrative and not exhaustive. It is our intention to leave the issue altogether open for reconsideration and decision by the court below.

Ancillary to the back pay issue is the question of compensatory per diem payments to black discriminatees. The company admitted that it had allowed either no or

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[20] Finding 86 states:

> Since the majority of blacks have held only laborer's jobs and since virtually all whites have held higher paying jobs, it follows that earnings of black employees, as a class, have been considerably lower than earnings of their white contemporaries, and lower than some later hired whites.

lower per diem payments to blacks called away from their home plants on Georgia Power business than it did to whites under the same circumstances, and the court enjoined such practices prospectively. To the extent that it can be proven that this discrimination withheld compensation for expenses actually incurred for meals and lodging (the basis for reimbursement to whites), the district court on remand should similarly reconsider its denials of such awards.

4. Limitations

Having determined that compensatory back pay may be appropriate relief in this case, sound judicial practice requires that we indicate what limitations period would govern back pay awards.

The limitations period to be applied under Title VII is a question of first impression upon which the statute itself is silent.[21] Though private complaints must be filed before the EEOC within 90 days, we cannot agree with the company that this period is the proper measure. This deadline is designed primarily to enhance the possibility of informal, out-of-court resolution of employment discrimination complaints through prompt administrative action. It is in no sense a limitation on the period for which one may receive back pay relief. Employment discrimination may as readily be a continuing course of conduct as a single event. Then too, an affected individual may not be aware of the discriminatory impact of certain employment practices until a pattern emerges as a result of the cumulation of numerous events over a substantial period of time. The remedial purposes of the Act would be frustrated were financial redress to be always limited to the 90-day period pre-

[21] Section 706(g) of the Equal Employment Opportunity Act of 1972 [42 U.S.C.A. § 2000e15(g)], while irrelevant to these proceedings, does specify that "back pay" liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

ceding the filing of a complaint. Furthermore, it would be inconsistent with the policy of Title VII if discriminatees who presented complaints about patterns or practices of discrimination to the EEOC which resulted in a Section 707 action by the Attorney General, were limited to recovery of back wages for a 90-day period while those seeking alternative relief under 42 U.S.C. § 1981 (under which the discriminatee may proceed without presenting a complaint to the EEOC) were to receive the advantages of a longer statute of limitations. Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970); *cf.* Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971).

At the opposite end of the time spectrum we find the EEOC and the Attorney General contending that the effective date of the Act should be the sole limitation on back pay relief. We similarly reject this dating for the recovery of back pay by individual discriminatees in pattern and practice suits under Title VII. Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable. *See e. g.*, United States v. Thompson, 98 U.S. 486, 488-491, 25 L.Ed. 194 (1878) and United States v. Summerlin, 310 U.S. 414, 416-417, 60 S.Ct. 1019, 94 L.Ed. 1283 (1940). However, this principle is not apropos to the present back pay claims. Insofar as the pattern or practice suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action. *Cf.* United States v. Beebe, 127 U.S. 338, 346, 8 S.Ct. 1083, 32 L.Ed. 121 (1888), and United States v. Smelser, 87 F.2d 799 (5th Cir. 1937). These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action.

Rather than the contention of either of the parties, we follow the general rule expressed in Beard v. Stephens, a

decision involving an action for damages under 28 U.S.C. § 1343:

> Congress has created many federal rights without prescribing a period for enforcement. In such cases the federal courts borrow the limitations period prescribed by the state where the court sits. The applicable period of limitations is that which the state itself would enforce had an action seeking similar relief been brought in a court of that state.
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> [372 F.2d 685, 688 (5th Cir. 1967)]

To accomplish this goal, "[w]e must look . . . first to federal law to determine the nature of the claim and then to state court interpretations of the state's 'statutory catalogue' to see where the claim fits into the state scheme." *Id. Beard* was a Section 1983 action alleging damages for the shooting of appellants by sheriff's deputies. Since the shooting was a trespass under Alabama law, we held that the state's 6-year limitation period for trespasses applied. O'Sullivan v. Felix, 233 U.S. 318, 34 S. Ct. 596, 58 L.Ed. 980 (1914); Sewell v. Grand Lodge of Int. Ass'n of Machinists and Aerospace Workers, 445 F.2d 545, 548-550 (5th Cir. 1971), cert. denied 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972); Franklin v. City of Marks, 439 F.2d 665 (5th Cir. 1971); Annot, 98 A.L.R.2d 1160 (1964). Where a federal statute creates rights for which both equitable redress and monetary damages may be appropriate, the analogous state statute of limitations governs the recovery of damages. Blair v. Page Aircraft Maintenance Inc., 467 F.2d 815 (5th Cir. 1972); McNair v. Burt, 68 F.2d 814 (5th Cir. 1934).[22] additionally, as is

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[22] Under Title VII, we are not concerned with a federal statute creating "a federal right for which the *sole* remedy is in equity." Traditionally, statutes of limitations do not control such purely equitable relief. Holmberg v. Armbrecht, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946); Perry v. Allen, 239 F.2d 107 (5th Cir. 1956).

true with regard to wholly equitable actions, the doctrine of laches is applicable to such monetary awards. *Cf.* Boudreaux v. Baton Rouge Marine Contracting Co., *supra*, 437 F.2d at 1017.

The court below cited two Georgia statutes which it deemed relevant to the determination of the appropriate limitations period—Ga.Code § 3-704 (relating to actions for rights accruing under statutes), and § 3-706 (relating to actions on implied contracts).[23] The right to be free from discriminatory practices in employment is not analogous to the right of action on implied or unwritten contracts which are governed by the 4-year limitation period of Section 3-706. Indeed, it is the *failure* to contract for employment or promotion on an equal basis which gives rise to a Title VII action.

Title VII and similar statutes created new causes of action which did not exist at common law or under state statutes. In respect to those causes of action which have no close analogies in state law, civil rights statutes have generally been held governed by the limitation on liabilities created by statute. Note, Federal Statutes Without Limitations Provisions, 53 Columbia L.Rev. 68, 69 (1953). *See* Smith v. Cremins, 308 F.2d 187 (9th Cir.

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[23] Section 3-704 provides:

> All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within 20 years after the right of action shall have accrued: Provided, however, that all suits . . . for the recovery of wages and overtime, subsequent to March 20, 1943, shall be brought within two years after the right of action shall have accrued.

Section 3-706 provides:

> All actions . . . for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, shall be brought within four years after the right of action shall have accrued.

1962); Bomar v. Keyes, 162 F.2d 136, 140 (2d Cir. 1947), cert. denied 332 U.S. 825, 68 S.Ct. 166, 92 L.Ed. 400, reh. den. 332 U.S. 845, 68 S.Ct. 266, 92 L.Ed. 416. *Cf.* Franklin v. City of Marks, 439 F.2d 670 (5th Cir. 1971). However, where federal laws create rights to back-pay as part of general remedial relief, courts have generally applied the appropriate state statute of limitations governing actions for unpaid wages. *See* Blair v. Page Aircraft, *supra;* Boudreaux v. Baton Rouge Marine Contracting Co., *supra.* We therefore determine that the limitations periods provided in Ga.Code § 3-704 should be applied in this case.

Section 3-704 contains two limitations periods: in general, suits for the enforcement of rights under statutes must be brought within 20 years after the action accrues. However, the same statute provides that all such suits seeking recovery of wages, overtime, or damages accruing under statutes respecting the payment of wages are governed by a 2 year limitation period. Thus, without regard to how the 20 year provision may affect the right of the Attorney General to sue for relief from a pattern or practice of discrimination,[24] the right of individual discriminatees to recover lost wages and like damages either in private class actions or the Attorney General's action is subject to Georgia's 2 year limitations period.

Two important aspects of the limitations issue remain. First, in each case of claims for back pay and like damages the court must determine the most recent date on which the discriminatee's cause of action accrued. For purposes of the statute of limitations, a cause of action

[24] There is no need to resolve the proper classification of such a pattern or practice suit as vindicating public or private rights and hence the effect, if any, of the 20 year limitation proviso since the Attorney General cannot sue on discriminatory acts which occurred prior to the effective date of Title VII of the Civil Rights Act of 1964, July 2, 1965. *Cf.* Clark v. American Marine Corp., 304 F. Supp. 603, 609 (E.D.La.1969).

accrues whenever an individual is directly and adversely affected by the discriminatory practices of the defendant. In individual cases this event may be refusal to hire the discriminatee, refusal to promote on the basis of race, or dismissal from employment. The date of the last act of discrimination for purposes of the statute of limitations is a question of fact for the district court. Boudreaux v. Baton Rouge Marine Contracting, *supra*, 437 F.2d at 1014-1016.

Second, the policy of Title VII requires that the filing of a complaint with the EEOC based on the identical patterns or practices of discrimination upon which suit is subsequently brought, operates to toll the statute of limitations as to all potential claimants who rely upon the *same* act of discrimination as the basis for their right. The limitation period remains tolled during such time as the processes of agency reconciliation are at work and until notification to the complainant that voluntary compliance cannot be obtained. *Cf.* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).

HIRING AND RECRUITMENT POLICIES

Failure or refusal to hire any individual on account of race is expressly prohibited by Section 703 of Title VII [42 U.S.C. § 2000e-2]. The private plaintiffs claim that this prohibition extends to Georgia Power's practices of (1) word-of-mouth recruiting and (2) recruiting for skilled personnel only at all-white institutions. The district court rejected both these contentions, saying:

> Advertisement of existing vacancies by word-of-mouth on the part of company employees has been the best means for recruitment, and often for promotion from time immemorial. It has been done by both blacks and whites in this company.
>
> Even if it were harmful, there is no known way to halt it. The mere fact that a company's personnel

has a majority of one race or another does not make such practice chargeable to the employer as a discriminatory act. Only if some preference were given the white referrals could the question rise to the point of decision. Nor is there any significance in the places of conducting interviews for possible management personnel. In short, the court finds no evidence substantiating a racially motivated policy of recruiting on the part of the company.

Only 7.2% of the company's labor force was shown to be black, although this race constituted a much larger percentage of the available labor force. In non-laborer jobs, this disparity is even greater. Under word-of-mouth hiring practices, friends of current employees admittedly received the first word about job openings. Since most current employees are white, word-of-mouth hiring alone would tend to isolate blacks from the "web of information" which flows around opportunities at the company. *See* Blumrosen, The Duty of Fair Recruitment Under the Civil Rights Act of 1964, 22 Rutgers L.Rev. 465, 477 (1968). No business necessity compels the company to continue to rely so heavily on this hiring technique. In fact, it contends it has already taken action to convey news of new openings to blacks by posting job notices on company bulletin boards which can be read by all personnel. Since 92.8% of all personnel likely to see these notices on a regular basis is white, however, this step is patently inadequate.

We believe that the district court stopped its reasoning short of the considerations which would have led to full equitable relief. Word-of-mouth hiring and interviewing for recruitment only at particular scholastic institutions are practices that are neutral on their face. However, under the facts of the instant case, each operates as a "built-in-headwind" to blacks and neither is justified by business necessity. While the court was without doubt free to leave these practices available for future use, its

failure to order them to be supplemented by affirmative action on the part of Georgia Power Company was clearly an abuse of discretion.

At least two courts have already recognized the need to counteract the discriminatory impact of word-of-mouth hiring. The Eighth Circuit in Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (1970), refused to enjoin "apparently neutral referral-type recruitment practices" only because it found that "[t]he Company . . . has initiated substantial changes in its recruitment procedures." *Id.* at 427. Where no effective alternative techniques were used to remedy the lock-in effect of similar recruitment polices, one district court proscribed the use of word-of-mouth hiring altogether. Clark v. American Marine Corp., D.C., 304 F.Supp. 603 at 606, 608.

The built-in headwinds which the present Georgia Power system harbors must be offset by affirmative steps reasonably calculated to encourage black employment and to break through the currently circumscribed web of information. For example, advertisements of openings in newspapers and periodicals accessible to the black communities of Atlanta and other Georgia cities, and public notice that the company is an equal opportunity employer, are common recruiting techniques which should be considered. We again decline to usurp the prerogative of the district court to formulate the exact relief which an overall decree will require on this one facet. We hold only that the present word-of-mouth practice must either be supplemented or changed.

The company's policy of seeking skilled personnel only at white educational institutions is similarly an invidious brake on black employment opportunities for which no business necessity justification was shown. While the company obviously ought not be enjoined to recruit on all college campuses unless it chooses to do so, it also ought not be allowed to continue to restrict its recruit-

ment programs to all—or preponderantly all—white institutions while maintaining such a racially imbalanced work force. The district court is likewise directed to supplement or change this practice.

THE SENIORITY SYSTEM

Promotions and demotions at Georgia Power are based upon an employee's job seniority in his section and seniority division. First preference in filing a job vacancy is given to the senior employee requesting such transfer, competency being sufficient, in the same job classification, section, and division where the vacancy exists. If there is no such request, the vacancy is filed by the promotion of the most senior employee, competency being sufficient, in the *next lower* classification of the section and seniority division, who requests promotion. Employees may transfer from one section to another, but may not transfer seniority gained in the former section to the new section. While seniority retained in a former section may not be used in a new section for any purpose, such retained seniority may be used in the former section as employment insurance in case of *lay-off* in the new section. If an employee has made a cross-section transfer and fails in his new classification, he is subject to possible discharge and cannot exercise his seniority rights to regain his former job.

Until April 29, 1969, the job classifications of laborer, janitor, porter, and maid were in separate and distinct "lines of progression." These employees (almost all of whom were black) could transfer to new sections only by giving up all seniority gained with the company. Just as the hiring and promotion practices disapproved above brought blacks into the four classifications which once were openly black jobs, the seniority system locked them into these jobs. Whether hired before or after the July 29, 1963 discontinuation of policies prohibiting black job

mobility, blacks ran a greater risk than whites of losing their jobs if they wished to advance within the company. Since there were no higher jobs in the "lines of progression" into which blacks were hired, any transfer from one of the four entry-level jobs could prove lethal.

The order of the district court enjoined the defendant from applying the system of "job seniority" to decide who should be temporarily or permanently promoted, transferred, demoted, or laid off when a competing employee is in the "affected classes." It also accorded "company seniority" rather than job seniority to certain discriminatees competing with non-discriminatees for promotion. However, it construed the affected classes of discriminatees to consist of only (1) black employees hired prior to August 19, 1963, (2) all black employees hired prior to July 29, 1963 who had a high school education and who had passed the company's aptitude tests, and (3) those black employees hired since August 19, 1963 who were denied job promotions or transfer for lack of a high school diploma. If the district court should determine that the company's testing program cannot be validated, it will necessitate broadening the affected classes entitled to seniority relief.

Full enjoyment of Title VII rights sometimes requires that the court remedy the present effects of past discrimination. *See* Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed 709 (1965). This includes both redressing the continuing effects of discriminatory seniority systems, Local 189, United Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); United States v. Jacksonville Terminal Co., *supra*; United States v. Hayes International Corp., *supra*, and affirmative action to alter a seniority system which is not discriminatory on its face. If the present seniority system in fact operates to lock in the effects of past discrimination, it is subject to judicial alteration under Title VII. Local 53,

International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969); Local 189, *supra*, at 991 of 416 F.2d.

Most courts, in molding appropriate remedies, have adhered to the "rightful place" theory, according to which blacks are assured the first opportunity to move into the next vacancies in positions which they would have occupied but for wrongful discrimination and which they are qualified to fill. Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 Harv. L.Rev. 1260, 1268 *n.* 2 (1967). This is the theory which should be applied here.

Should company test invalidity be the trial court's ultimate conclusion, then seniority would thereby be extended to all blacks wrongfully deprived of the opportunity to advance beyond the positions of laborer, porter, janitor, or maid by either the testing or the high school education requirements. This relief reaffirms that "[t]he ethic which permeates the American dream is that person may advance as far as his talents and his merit will carry him." Miller v. International Paper Co., 408 F.2d 283, 294 (5th Cir. 1969).

COUNSEL FEES

The district court recognized that Section 706(k) [42 U.S.C. § 2000e-5(k)] and our decision in Clark v. American Marine Co., 329 F.Supp. 709 (E.D.La.1970), aff'd. 437 F.2d 959 (5th Cir. 1971) entitle the plaintiffs' lawyers in a successful Title VII suit to recover reasonable attorneys' fees.

In view of our remand for further proceedings, we pretermit any additional ruling on the challenge to the action of the court on this issue at this time, although it seems appropriate to call attention to the fact that at the minimum fee rate, cited by the district court, Attor-

ney Webster would be entitled to 360 dollars more than the amount awarded her solely for the time she spent on the case prior to trial.

The judgment of the trial court is affirmed in part and vacated in part and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

Affirmed in part, vacated in part, and remanded.

APPENDIX E

U.S. DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Nos. 12355, 11723, 12185, and 14182,

June 30, 1971

UNITED STATES

v.

GEORGIA POWER COMPANY, LOCAL UNION NO. 822, ATHENS, LOCAL UNION NO. 84, ATLANTA, LOCAL UNION NO. 923, AUGUSTA, LOCAL UNION NO. 730, COLUMBUS, LOCAL UNION NO. 896, MACON, LOCAL UNION NO. 847, ROME, LOCAL UNION NO. 511, VALDOSTA OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; KING, *et al.* v. GEORGIA POWER COMPANY and LOCAL 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; MOOREMAN v. Same; JONES v. GEORGIA POWER COMPANY

Reconsideration of order July 2, 1971

Full Text of Opinion

SIDNEY O. SMITH, Jr., Chief Judge:—These are suits under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e). Number 12355 is an action initiated by the Attorney-General under the provisions of 42 U.S.C. § 2000e-6. Number 11723 is a class action and Numbers 12185 and 14182 are individual private actions brought under 42 U.S.C. § 2000e-5(e) after due compliance with the administrative prerequisites. All were consolidated for trial purposes. Together they encompass all aspects of hiring and promotion practices within the Georgia Power Company statewide and the application of the provisions of the single collective bargaining agree-

ment entered into by it with defendant unions, International Brotherhood of Electrical Workers Locals 822, 84, 923, 780, 896, 847 and 511 at the several production facilities located within the state. The central issues relate to the educational and testing requirements for employment and promotion utilized by Georgia Power and the effects of the "job seniority" system embodied in the respective union contracts. Heretofore on temporary injunction, the court has considered the prevailing patterns and practices as they relate to the following classes of employees as affected by the adoption of the company requirement of a high school education in 1960 and of passing certain aptitude tests on August 19, 1963, and the prohibition of advancement by black employees from lower job classifications prior to July 29, 1963:

(a) Class 1, consisting of all black employees hired prior to 1960, who did not have a high school education.

(b) Class 2, consisting of all black employees hired prior to August 19, 1963, who have not passed the Company's aptitude tests.

(c) Class 3, consisting of all black employees hired prior to July 29, 1963, who possessed a high school education and who had passed the company's aptitude tests.

Under the retrospective rationale of Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969), cert. den. 397 U.S. 919, 2 FEP Cases 426 (1970), the court concluded that the present policies, all instituted prior to the effective date of the Act (July 2, 1965), perpetuated the penalizing effect of pre-Act employment and promotion practices as between black employees and white employees. As a result, substantial relief was afforded those black employees in Class 1, Class 2, and Class 3 by the order of October 5, 1970. Also considered at the temporary hearing was Class 4, consisting of all black employees hired by the company since July 29, 1963,

to date. No showing was made of a discriminatory pattern or practice as to such group as a whole and relief was denied.

At the final hearing, the issues framed at pre-trial were categorized as follows:

I. Complaints of General Discriminatory Patterns and Practices by the Company.

Question 1. Whether the defendant Georgia Power Company has discriminated against black employees *hired since July 29, 1963*, through

(a) initial assignment to laborer's classifications.

(b) the operation of the collective bargaining agreements entered into with the Union.

Question 2. Whether the defendant Georgia Power Company has discriminated against potential black job applicants by its *"recruiting" practices.*

Question 3. Whether the defendant Georgia Power Company has discriminated against black employees by paying them *lower per diem payments* than it paid to white employees working on the same out-of-town jobs. (This issue was presumably settled during pre-trial conference.)

II. Complaints of Discriminatory Educational and Testing Requirements by the Company.[1]

Question 4. Whether the defendant Georgia Power Company has discriminated against black job applicants by its

(a) High-school education requirements.

(b) Aptitude tests requirements.

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[1] Ruling on these questions was specifically stayed pending the appeal of Griggs v. Duke Power Company, 420 F.2d 1225, 2 FEP Cases 310 (4th Cir. 1970). However, all evidence was presented at the trial. The Supreme Court decision has now issued, thus permitting this opinion and order to constitute a final judgment in the cases. Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175, March 8, 1971.)

Question 5. Whether the defendant Georgia Power Company has discriminated against black employees in promotions by its

(a) High-school education or equivalent requirements.

(b) Aptitude test requirements.

Question 6. Whether the defendant Georgia Power Company has discriminated against blacks by the manner of administering its educational and testing requirements.

III. Complaints of General Discriminatory Patterns and Practices by the Unions.

Question 7. Whether the defendant union has discriminated against *black hired since July 29, 1968*, through the operation of the collective bargaining agreements entered into with the company (same as Question 1 (b)).

Question 8. Whether the defendant union has discriminated against black employees in failing to pursue their grievances.

IV. Relief and Remedy.

Question 9. Whether, if further affirmative relief is granted, the Attorney-General in a pattern and practice case is authorized to secure class relief in the way of:

(a) back pay

(b) retroactive seniority

(c) reinstatement, or

(d) employment.

V. Private Claims.

Whether the individual claimants (who are involved in one or more of main questions) have been discriminated against in the specific manner complained of in their suits and, if so, what relief is appropriate.

Upon the evidence presented at the final trial, the court makes the following

FINDINGS OF FACT [2]

1. The main suit was initiated by the Attorney General seeking relief for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e on January 10, 1969. (Complaint of the United States, January 10, 1969). The private suits were filed at times prior and subsequent to the government suit and consolidated for trial.

2. Defendant Georgia Power Company (hereinafter sometimes referred to as "the Company") is incorporated under the laws of the State of Georgia and is engaged in the business of production, distribution and sale of electrical power and service in numerous cities in the State of Georgia, including Atlanta, where it maintains its principal office. (Answer of May 28, 1969).

3. On December 25, 1970, Georgia Power Company employed 7,515 persons. Of these employees 6,891 were white persons and 534 were black persons (Gov. Ex. 4, Gov. Ex. 5, Gov. Ex. 14).

[UNIONS]

4. Defendants, Local Union No. 822, Athens; Local Union No. 84, Atlanta; Local Union No. 923, Augusta; Local Union No. 780, Columbus; Local Union No. 896 Macon; Local Union No. 847, Rome; and Local Union No. 511, Valdosta; of the International Brotherhood of Electrical Workers (hereinafter sometimes referred to as "the Unions") are unincorporated associations doing business in the State of Georgia. (Answer of Defendant Local Unions to Paragraph 5 of the Complaint, May 27, 1969).

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[2] Findings 1-24 were originally made in the order of September 22, 1970. In certain minor respects, subsequent evidence has produced changes which are reflected in the final form. All are repeated as permanent findings of the court and to give continuity to the case.

5. Defendant Unions are exclusive bargaining representatives of approximately 3,853 employees of the Company with respect to rates of pay, wages, hours of employment, working conditions and other conditions of employment. All of the Unions have entered into a single collective bargaining agreement with the Company. (Answer of Defendant Unions to Paragraph 8 of the Complaint, May 28, 1969; Gov. Ex. 2, p. 1; Gov. Ex. 4; Gov. Ex. 5; Gov. Ex. 14).

6. A majority of the Company's employees are involved in the production, transmission, distribution and sale of electrical power. Production of electrical energy at the Company's steam and hydroelectric generating plants is a function of the Production Department. The Production Department is operated as a single administrative unit for purposes of promotion, transfers, demotions and layoffs. Its jurisdiction is statewide. Transmission, distribution and sale of electrical energy and appliances are functions of seven geographic operating divisions with headquarters at Athens, Atlanta, Augusta, Columbus, Macon, Rome and Valdosta. Each of the seven divisions is a separate administrative unit for purposes of promotion, transfer, demotion and layoffs, and in these respects corresponds to the Production Department. (Def. Ex. K.) The Construction Department is divided into Plant Construction, Line Construction and Substation Construction, each of which is a separate administrative unit for purposes of promotion, transfer, demotion and layoffs. Each administrative unit has statewide jurisdiction. (Def. Ex. K). The General Service Department is responsible for maintenance of many of the Company's motor vehicles at a central garage. In addition, the General Services Department in Atlanta includes the General Repair Shop, Automotive Equipment Repair Shop, Printing and Stationery Department, Building Construction, and General Office Building Services. The General Services Department is an administrative unit for purposes

of promotion, transfer, layoff and demotion. (Def. Ex. K).

7. Each of the above mentioned "Administrative units" is referred to in the collective bargaining agreement as a "seniority division" for the purposes of determining seniority rights of employees under the agreement. (Gov. Ex. 2, Collective Bargaining Agreement of July 1, 1968, pp. 8-9).

[CONTRACT]

8. The collective bargaining agreements currently in effect between the Unions and the Company, which was signed on April 22, 1969, became effective for working conditions on April 29, 1969 and was made effective retroactively for wages only to July 1, 1968, and will be in effect through June 30, 1970, and from year to year thereafter, unless the parties, by following certain provisions of the agreement, amend it. This agreement superseded an agreement dated July 1, 1965. (Gov. Ex. 2, pp. 33-34; Gov. Ex. G, p. 4, ¶ 8).

9. The collective bargaining agreement in effect during the times material to this action set forth each job classification, and set forth sections in which these job classifications are contained. The agreements also set forth rates of pay for each job classification within each section. A section may contain one or more lines of progression. (Stipulation No. 6; Gov. Ex. 1, pp. 2, 35-72; Gov. Ex. 2, pp. 2, 36-86).

10. The lines of progression contained in the various sections of the collective bargaining agreement contain functionally related jobs, through which employees progress from entry level jobs to successively higher paying jobs (Gov. Ex. 8, pp. 8-90; Co. Ex. E and G). Under the current collective bargaining agreement, there are 19 such sections within the Company (Gov. Ex. 2, p. 2; Gov. Ex. 16). These sections are utilized for granting pro-

motions and for demotions due to lack of work as follows: promotions, competency being sufficient, and demotions due to lack of work are based upon an employee's classification seniority in the respective section of the seniority division in which he is employed. First preference in filling a job vacancy is given to the senior employee, competency being sufficient, in the same classification in the same section and division where the vacancy exists, requesting such transfer. If no such employee requests a lateral transfer, the vacancy is filled by the promotion of the most senior employee, competency being sufficient, in the next lower classification in the section and seniority division requesting such promotion. An employee's seniority rights are not affected by his waiver of a promotion with one exception. (See page 12, ¶ (e), Gov. Ex. 1). The classification to which an employee is demoted depends upon his combined seniority in his classification and lower classifications at the time of demotion as compared to the combined seniority of the employees in the lower classification (Gov. Ex. 2, p. 9, ¶ 20(a) and p. 11, ¶ 20(e); Co. Ex. G, ¶ 10). Employees may transfer from one section to another, but they may not transfer seniority gained in the former section to the new section. While seniority retained in a former section may not be used in his new section for any purposes, in case of layoff due to lack of work in his present section, such retained seniority may be used in the former section as his protection against layoff. (Gov. Ex. 1, p. 14, ¶ 22). If an employee has made a cross-section transfer and is deemed to be incompetent in his new classification he cannot exercise his seniority rights for the purpose of regaining his former classification, but is subject to possible discharge.

11. Until April 29, 1969, the job classification contained in Sections 17, 18 and 19 of the Collective Bargaining Agreement were Laborers, Janitors and Porters, and Maids, respectively. Until April 29, 1969, the job classifications of Laborer, Janitor, Porter and Maid were

in separate and distinct lines of progression reserved for those four job classifications only (Gov. Ex. 1, pp. 47-48), and employees assigned to the section or line of progression for Laborer, Janitor, Porter and Maid could transfer to new sections only by giving up seniority gained in those classifications (Gov. Ex. 1, p. 14). These job classifications, as other job classifications, were added to the bargaining unit as functional groups during the course of collective bargaining. (Gov. Ex. 1; Co. Ex. G).

[CURRENT CONTRACT]

12. Under the terms of the current collective bargaining agreement between the Defendant Company and Defendant Unions, the Laborer's job classification (formerly separate) has now been made the entry level job classification in the lines of progression in 15 of 19 sections as that term is used in the collective bargaining agreement. (Gov. Ex. 2, pp. 2, 35-78; Gov. Ex. 16; Co. Ex. E). The term "entry level job" as used in this paragraph means simply the job that pays lowest in a particular line of progression (see Co. Ex. 2). In point of fact, some white employees do not enter as Laborers, but in the next highest paying job classification.

13. As a result of the current collective bargaining agreement, "Section XVII, Laborers in Any Department of the Company, in the 1965 Collective Bargaining Agreement" was abolished and persons assigned to that section were reassigned to the particular section in which they were working as of April 29, 1969. The persons affected in this instance retained the section seniority which they had accumulated in Section XVII and it became their section seniority in the section to which they were assigned. (Gov. Exs. 1 and 2; Gov. Ex. 8, pp. 172-173).

14. The job classifications of Laborer, Janitor, Porter, and Maid are and have been at all times material to

this action, the lowest paying jobs in the Company covered by the collective bargaining agreement. The next lowest paying job which pays more than the above four is that of Helper. (Gov. Ex. 1, pp. 35-62; Gov. Ex. 2, pp. 36-78; Gov. Ex. 16). The Defendant Company requires that persons hired into jobs other than that of Laborer, Janitor, Porter and Maid have a high school education or its equivalent and take and achieve certain scores on Company-administered aptitude tests (Co. Ex. G, p. 6, ¶ 13). The Company does not require those individuals performing the Laborer's job duties to perform other than unskilled work or common labor. (Gov. Ex. 8, pp. 33-35).

15. Prior to July 29, 1965, all black employees of Georgia Power Company who were represented by the Unions were hired for, assigned to and worked only in the job classifications of Laborer, Janitor, Porter and Maid. Prior to that time, no black employee worked in a higher classification. (Gov. Ex. 15). Prior to July 2, 1965, a majority of newly-hired white employees were assigned to job classifications other than Laborer, Janitor, Porter and Maid. The jobs to which a majority of said white employees were assigned paid more money than any of those four jobs and entailed greater job responsibilities and duties than those four jobs. No white employees were ever assigned to the jobs of Janitor, Porter or Maid. (Gov. Ex. 17; Gov. Ex. 8; Gov. Ex. 4).

[HIGH SCHOOL EDUCATION]

16. In 1960, the Company imposed a requirement that all new employees have a high school education or the equivalent. This requirement was not imposed on incumbent employees (Gov. Ex. 8, p. 115-116).

17. On August 19, 1963, the Company imposed a requirement that all new employees and all incumbent employees assigned to the job classifications of Laborer,

Janitor, Porter and Maid seeking to transfer to jobs in a new line of progression, take and achieve a pre-determined passing score on one or more aptitude tests. Incumbent employees in other classifications were not required to take or pass aptitude tests in order to be promoted in their line of progression or to transfer to other lines of progession. (Gov. Ex. 8, pp. 106, 115).

18. Sometime in 1964 the Company imposed the high school education requirement on most incumbent employees seeking to transfer from the job classifications of Laborer, Janitor, Porter and Maid to higher-paying jobs. (Gov. Ex. 8, pp. 106, 107).

19. Effective November 19, 1964, the Company suspended the educational requirement and aptitude test requirement for the Laborer's Classification. At the time that it suspended these requirements for the Laborer's Classification, the Company began using "waiver of employment standard" forms. Those forms recite that the Company has waived one or both of said criteria and that before the individual can progress under these circumstances to a higher classification, he must meet these requirements. (Co. Ex. G, p. ¶ 13; Gov. Ex. 8, p. 107).

[CLASSIFICATIONS CREATED]

20. Pursuant to the collective bargaining agreement of April 22, 1969, the job classifications of switchman and coal sampler were created. Laborers were and are allowed to bid upon these jobs. These two jobs pay approximately $20.00 per month more than the job of laborer. (Gov. Ex. 2, pp. 36-78). No white employees have held the jobs of switchman or coal sampler. White employees have been employed as laborers and are allowed to bid upon the job classifications of switchman and coal sampler. (Gov. Ex. 17).

21. Of the total of 456 black employees on January 16, 1970, 189 black employees were hired by the Com-

pany between July 29, 1963, and January 16, 1970. (Gov. Ex. 15). Of those 189, 70 possessing high school educations were hired into job classifications represented by the defendant unions. (Gov. Ex. 17). Twenty-four (24) of the 70 held jobs higher than entry level jobs at the time of the preliminary hearing in this case, August 14, 1970. (Co. Ex. A & C). Of the remaining 46, 36 have been tested by the Company and 32 failed the Company's test. With respect to the four that passed the test, one applied for the job of custodian, one applied for the job of porter, and two applied for the job of laborer. The remaining ten employees were not tested by the Company. Of this ten, eight applied for jobs not requiring a passage of the Company-administered aptitude test. Each of these ten employees signed the Company's waiver form acknowledging that the testing requirement had been waived and that they would have to meet such a requirement before they could be promoted. (Co. Ex. A & C).

22. Twenty-nine (29) black employees possessing high school educations were initially hired into steam plant production facilities and by the Atlanta and Macon operating divisions between July 29, 1963, and January 16, 1970. (Gov. Ex. 17). Of these 29, five were initially assigned to jobs higher than that of Laborer, Janitor, Porter, Coal Sampler, Switchman or Maid, and five were employed in classifications other than that of Laborer, Janitor, Porter, Coal Sampler, Switchman or Maid as of August 14, 1970. (Co. Ex. A). Of the remaining 19, 15 took the Company's aptitude test and each of these persons failed it. Four of the 19 were not tested and each of these persons signed the Company's waiver form acknowledging that the testing requirement had been waived and that they would have to meet such a requirement before they could be promoted. Each of these four indivdiuals applied for a job not requiring passage of the aptitude test. (Co. Ex. A & C).

[ASSIGNMENTS OF WHITES]

23. Between July 2, 1965, and January 16, 1970, of the 600 white employees hired in the steam plants, the General Repair Shop, and in the Atlanta and Macon Operation Divisions, in jobs covered by the collective bargaining agreement who were still employed by the Company on January 16, 1970, 542 were assigned to entry level jobs higher than Janitor, Porter, Laborer, Coal Sampler, and Maid. No whites were assigned to the jobs of Janitor, Coal Sampler, Porter or Maid. While both black and white employeer were initially assigned to Laborer jobs those whites who were assigned to Laborers' jobs remained in that job for an average length of less than four months. Although black employees in the laborer classification average a longer period of time than whites prior to promotion, there are black employees who have been promoted within two weeks and white employees who have remained as laborers for as long as 15 months. There were black and white employees initially assigned to jobs higher than those mentioned if they met Company standards for such initial assignment. There are presently some 70 black employees in jobs higher than those mentioned as a result of either initial assignment or promotion to those higher jobs since 1963. (Gov. Ex. 17; Co. Ex. A, B and C).

24. On September 6, 1968, there were 877 persons employed by the Company in job classifications covered by the collective bargaining agreement who were hired during the period commencing July 2, 1965, through September 6, 1968. Of these 788 were white persons and 89 were Negroes. The monthly salary of those 87 employees, by race and the percentage of Negro employees earning salaries in the range indicated on September 6, 1968, was as follows:

Monthly Salary	White	Negro	Percentage Negro
Over $800	0	0	0
$700-$800	0	0	0
$600-$700	15	0	0
$500-$600	517	0	0
$400-$500	236	1	0.4
Under $400	20	88	81.0
TOTAL	783	89	10.0

(Gov. Ex. 9).

New Findings

25. In 1960, the Company imposed a requirement that all new employees have a high school education or the equivalent. This requirement was not imposed on incumbent employees. (Gov. Ex. 8, p. 115-116).

On August 19, 1963, the Company imposed a requirement that all new employees and all incumbent employees assigned to the job classifications of Laborer, Janitor, Porter and Maid seeking to transfer to jobs in a new line of progression, take and achieve a pre-determined passing score on one or more aptitude tests. Incumbent employees in other classifications were not required to take or pass aptitude tests in order to be promoted in their line of progression or to transfer to other lines of progression. (Gov. Ex. 8, pp. 106, 115).

Sometime in 1964 the Company imposed the high school education requirement on most incumbent employees seeking to transfer from the job classifications of Laborer, Janitor, Porter and Maid to higher-paying jobs. (Gov. Ex. 8, pp. 106, 107).

Effective November 19, 1964, the company suspended the educational requirement and aptitude test requirement for the laborer's classification. At the time that it suspended these requirements for the laborer's classifica-

tion, the company began using "waiver of employment standard" forms. These forms recite that the company has waived one or both of said criteria and that before the individual can progress under these circumstances to a higher classification, he must meet these requirements. (Co. Ex. G, p. 6, ¶ 13; Gov. Ex. 8, p. 107).

26. Of the 456 Blacks employed on January 16, 1970, 189 were hired by the company between July 29, 1963, and January 16, 1970. Of these 189, 70 possessing high school educations were hired into job classifications represented by the defendant unions of which 28 have passed the aptitude tests. Of these, five were employed at positions higher than laborer. Presently, 25 hold positions higher than laborer. Presently, all Negro employees having a high school education and having passed the Company's test have been assigned to or promoted to jobs other than Laborer, Janitor, Porter or Maid that have applied for or bid on such jobs and have competency sufficient to perform the jobs. (Co. Exs. A, B, C, 7; Gov. Exs. 6, 7, and 17)

27. Of the remaining 45, 35 have been tested by the Company and 32 failed the Company's test. With respect to the three that passed the test, one applied for the job of Custodian, and one applied for the job of Porter, and one applied for the job of Laborer. The remaining ten employees were not tested by the Company. Of this ten, eight applied for jobs not requiring a passage of the Company-administered aptitude test. Each of these ten employees signed the Company's waiver form acknowledging that the testing requirement had been waived and that they would have to meet such a requirement before they could be promoted. (Co. Exs. A, C and 7).

[HIRING IN 1970]

28. Between January 16, 1970 and December 25, 1970, 39 Negroes were hired into bargaining unit jobs. Of

this 39, eleven were assigned to jobs other than Laborer, Janitor, Porter or Maid. (Co. Ex. 7). Seventeen Negroes were hired in non-bargaining unit jobs during this same period and none were hired as Laborers, Janitors, Porters or Maids. (Co. Ex. 7).

29. Between July 29, 1963, and January 10, 1969, 627 white employees were hired in the steam plants, the General Repair Shop, and in the Atlanta and Macon Operating Divisions in jobs covered by the collective bargaining agreement who were still employed by the Company on January 16, 1970. Of these, 534 were assigned to entry level jobs higher than Janitor, Porter, Laborer, Coal Sampler and Maid. Those whites who were hired as Laborers remained in that job for an average of only three months and one week before being promoted to higher paying jobs. The longest time any white spent as a Laborer during this period was one year and one month. Only one white hired during that period has not been promoted. (Gov. Exs. 6, 7, 15 and 17).

30. Twenty-nine black employees possessing high school educations were initially hired into steam plant production facilities and by the Atlanta and Macon Operating Divisions between July 29, 1963, and January 16, 1970. (Gov. Ex. 17). Of these 29, five were initially assigned to jobs higher than that of Laborer, Janitor, Porter, Coal Sampler, Switchman or Maid; and six were employed in classifications other than that of Laborer, Janitor, Porter, Coal Sampler, Switchman or Maid as of January 11, 1971. (Co. Exs. A and 7). Of the remaining 18, 15 took the Company's aptitude test and each of these persons signed the Companys' waiver form acknowledging that the testing requirement had been waived and that they would have to meet such a requirement before they could be promoted. Each of these four individuals applied for a job not requiring passage of the aptitude test, (Co. Exs. A and C).

Twenty-one of the 24 Negroes hired into non-bargaining unit jobs between July 29, 1963, and January 16, 1970, were hired and assigned to jobs other than Laborer, Janitor, Porter or Maid. (Co. Ex. B).

Three Negroes having high school educations were hired at Plant Harllee Branch during 1967 as Laborers. Each of these employees failed the aptitude test. The Company did not hire any employees into bargaining unit jobs at Harllee Branch except as Laborers during 1967. (Gov. Exs. 6, 7 and 17). The Company hired only Laborers into bargaining unit jobs at Plant Hammond from July 29, 1963, to January 16, 1970. (Gov. Exs. 6, 7 and 17). From 1964 through 1966, all new bargaining unit employees at Plant Yates were initially assigned to the laborer's classification. In 1967, one new employee was initially assigned to a bargaining unit job other than Laborer. (Gov. Exs. 7 and 17). Since April 27, 1965 at Plant McManus and since April 12, 1965, at Plant Mitchell all persons hired into bargaining unit jobs have initially been assigned to the Laborer's classification. (Gov. Exs. 7 and 17). Between July 29, 1963, and January 10, 1969, 154 white employees were hired at the steam production plants into bargaining unit jobs and 106 were initially assigned to the Laborer's classification. (Gov. Ex. 17). No Negro employee hired at a steam production plant as a Laborer was hired during the same month as a white employee who was hired at the same location into a bargaining unit classification other than Laborer. (Gov. Exs. 7 and 17).

[EMPLOYEES INFORMED]

31. Negro employees hired after the institution of the testing requirement, August 19, 1963, were informed at the time of hire that passage of the Company's aptitude tests was a prerequisite to promotion. These employees were orally informed of this requirement and/or made aware of it through the Company's "waiver of employ-

ment standards" form. Although certain Government witnesses testified that they were not informed of the requirement at the time of hire, each of these witnesses executed the waiver form. These employees, as others, signed the form voluntarily. Each of the Government witnesses that signed the form knew how to read and admitted that the signatures appearing on the form were authentic. (Co. Exs. A and C).

32. The company's normal policy is to test employees at the time they are hired or at the time a temporary, or petty cash, employee changes status to a regular or permanent employee. Most employees, black and white, who had a high school education and who did not voluntarily sign a waiver, were tested promptly. However, the testing procedures for those employees lacking a high school education, or who have signed a waiver, or who were previously employed in a classification requiring neither are not uniform. There is no set company-wide policy for periodic testing of these employees, nor is a set number of testing opportunities, nor a definite testing time after initial hiring nor a uniform method of requests. Nor is the question covered by the collective bargaining agreement.

33. As a result, the administering of tests in such categories varies from division to division, dependent upon the individual policies of the Plant Manager or the desires of the employee to be tested. Some were tested once; others many times. Some were told there was a waiting period; others were not. Some were tested promptly after imposition of the requirement; some waited up to four years; some only upon a bid for promotion to a higher position. As seen, the great bulk of employees in these categories are black. However, there is no evidence that any person requesting an initial test has been refused nor that any whites in those categories are treated differently.

[TEST FAILURE]

34. The Collective Bargaining Agreement requires a senior bidder be informed of the reason his bid is denied. When there is a test failure, the practice is again irregular. Some employees are told promptly that they failed the test; other failures are unreported or learned only upon a rebid and consequent retest. This occurs primarily from a lack of uniform policy and understanding by division management personnel. Many consider the test passage as a pre-requisite to the bid while it is looked upon as a part of the bid by some managers. However, no racial discrimination results therefrom. While most employees in this category are black, there is no evidence of any white being treated differently. No qualified employee, black or white, has been denied the right to bid. Any failure in respect of informing test failure under the bid process is correctible under the Collective Bargaining Agreement and unrelated to race.

35. Under the terms of the collective bargaining agreement in effect since July 2, 1965, an employee temporarily relieving or substituting for another employee in a higher classification is entitled to be paid on the schedule of the rate of such higher classification, provided he works in the higher classification for four consecutive hours or more at any given time. When an employee performs certain other work not assigned to any classification, such as driving tractor drawn lawn mowers, or finishing concrete, he is entitled to be paid a differential specified by the agreement for such work. (Gov. Ex. 1, p. 15 ¶ 24).

36. When Negro employees have been required to work in higher classifications in the bargaining unit or have been "blueslipped" to perform work such as sandblasting or operating a tractor-drawn lawnmower, they have been paid at the rate of the higher classification or the rate required by the contract, if they worked in these classifications as much as four hours a day. (Gov. Ex. 2). The

Company has not made it a practice to relieve Negro employees from such jobs before the expiration of the four-hour period unless the assigned work was completed. There is no evidence that the Company has a policy, practice or custom of paying employees at different rates when they are required to perform work normally assigned to other employees or classifications not covered by the Collective Bargaining Agreement. (Gov. Ex. 2, Collective Bargaining Agreement).

[PAYMENT OF EXPENSES]

37. The Company has paid, and continues to pay all expenses for board and lodging that are incurred by white employees of the construction department while these employees are working on sites that are away from their homes. Until sometime in 1969 the Company did not reimburse black employees in any way for the living expenses incurred while away from home. During 1969 the Company began to reimburse black employees at the rate of $38.50 per week to cover all expenses that they incurred in obtaining board and lodging. At all times since July 2, 1965, white construction department employees have had their meals and loding paid for by the Company, rather than being paid a lump sum. The result of this practice is that white employees are able to secure more desirable accommodations, which cost more, than blacks are able to secure on the flate rate.

The Company has no control over the discriminatory practices of public places of accommodation or the practice of individual employees to frequent one or more of such places on their own time. Nor is the Company responsible for any acts of discrimination against its employees by members of the general public in the areas in which it operates. It is not responsible for the maintenance of separate white and black waiting rooms in the private offices of Company-designated physicians, attorneys and the like and there is no showing that any such

practice is required, encouraged, or condoned by the Company.

38. Georgia Power Company has a large pool of qualified black applicants from which employees could be selected. For example, 33% of the applicants at Plant Yates and Plant Harllee Branch during the years 1967-1969 were black. (Gov. Ex. 20, 21). Seventy percent of these black applicants had high school educations. (Gov. Ex. 20, 21; co).

39. Applications for employment are kept on file for up to three years at the various locations where hiring is done. Normal procedure is that when a vacancy occurs, the person responsible for hiring will review the applications on file, and call one or more applicants to be interviewed.

40. Many qualified black persons have applied for employment at times when the Georgia Power Company has had job vacancies. For example, 17 black applicants testified that they had applied for jobs but were not hired. These applicants were told by Company officials that there were no openings when in fact, whites were hired into job vacancies for which the blacks were qualified within 90 days after the black applicants had applied. (Gov. Ex. 18, 19).

41. Black applicants were told by Company officials that there were no openings available, even though they had applied in response to statements, either by the Company or by the Georgia State Employment Service, that there were openings.

[INTERVIEWS NOT HELD]

42. Georgia Power Company often does not interview qualified black applicants for employment, despite the fact that many of them express a continuing interest in working for the Company.

43. There was no evidence that the Company considered an application to be current for any particular period of time. The successful job applicants were generally hired within two weeks after they applied. (Co. Ex. 12; Gov. Exs. 6 and 7). Many job applicants, both black and white, were not called when vacancies ocurred although they were told they would be called when they filed applications.

The Company did not have a practice of administering its aptitude test to all applicants for employment. For example, during a three-month period prior to the time that the Government witnesses applied at the general office, there were 275 other persons who applied but were not tested. (Co. Exs. 12 and 13). Additionally, during the three-month period prior to the time that Abrams, Jarrett and Pollard applied at Plant Harllee Branch, 28 other persons applied who were not tested. (Co. Exs. 12 and 13). At Plant Yates, where Tommy Cook and Larry Paige applied, there were 31 persons who applied but only two of these were tested and one of these was Cook. (Co. Exs. 13-5 and 13-15).

44. Virtually all black applicants are told that they will be called if a vacancy develops. Almost none are ever called back by the Company, even though vacancies do occur for which the applicants are qualified.

45. Company supervisors have occasionally engaged in practices calculated to discourage black applicants. Black applicants have been told either that job openings are rare occurrences or that applicants are not hired off the street for certain jobs when in fact, the converse is true. One black applicant for a laboratory assistant's job who had several years of college as a chemistry major was told that the position would be filled from within the Company. Two whites were hired off the street into laboratory assistant jobs at the plant where Jarrett applied within a year of his application. Black applicants have

in some instances been offered jobs which are considerably lower-paying for jobs that they are qualified to perform. Company supervisors have failed to direct black applicants to offices which do the hiring for the type of job a black has applied for. Company interviewers have sometimes required black applicants to wait for long periods of time before they were interviewed. Black applicants have been asked to return for interviews but they have not been told, when interviewers will be available to see them.

[NON-WHITE POPULATION]

46. The 1960 Report of the Bureau of the Census indicates that 28.6% of Georgia's population is non-white.

47. Georgia Power Company hires relatively few white non-high school graduates. On the other hand, it hires relatively large numbers of black non-high school graduates and relatively few high school graduates. For example, from 1967 through 1969, at Plant Yates and Plant Harllee Branch the Company hired 47 whites, all of whom were high school graduates, and 14 blacks, 7 of whom were high school graduates and 7 of whom were non-high school graduates. (Gov. Ex. 17). Of the 365 white who applied during that period, 51 or 14,% were not high school graduates. (Gov. Ex. 20, 21; Co. Ex. 10).

48. There were 690 applications for employment filed at Plants Harllee Branch and Yates from 1967 through 1969. One hundred twenty-six (126) of these applicants were hired. Of the 546 persons that were not hired, at least 421 had a minimum of a high school education. Fifty-six of the applicants did not complete the educational portion of the applications. From 1950 to 1955, in the Atlanta and Macon Operating Divisions and the General Repair Shop, 43 persons without high school educations were hired into jobs other than laborers' jobs. From 1956 through 1960, 24 persons without a high

school education were hired into the steam plants, the Atlanta and Macon Operating Divisions and the General Repair Shop, who did not have a high school education and were still working for the Company on January 16, 1970. (Co. Ex. 10; Gov. Ex. 17 as corrected by Co. Ex. 9).

49. It is the Company's general practice to attempt to fill job vacancies from within the Company. In the bargaining unit the Company posts all jobs for a period of five days before it attempts to fill the job with a new hire. The plant superintendent at a production plant has no advance notice of vacancies which may occur at his plant because employees in the Production Department have the right to bid on job vacancies anywhere in the state. It is possible that a plant superintendent could tell a job applicant that no vacancies exist at his plant and be notified five minutes later that a vacancy has been created at his plant by the bidding system.

[RELIANCE ON REFERRALS]

50. Georgia Power Company relies, to a substantial extent, on referrals from incumbent employees to fill existing job vacancies. Many employees black and white learn of vacancies through incumbent employees. Approximately 30% of persons employed by Georgia Power Company on January 16, 1970, hired had friends or relatives who were already working for the Company. (Gov. Ex. 6).

51. Georgia Power Company maintains recruitment programs at several engineering colleges throughout the south. Most of these institutions have predominantly white student bodies. It has attempted selective management recruiting at several Atlanta Negro colleges when the demand for qualified graduates is great, but still relies primarily upon the former as a source for executive personnel.

Testing

52. To be eligible for promotion to other than Laborer's jobs, Georgia Power Company requires that employees achieve specified scores on each of three (for most jobs) employment aptitude tests (Gov. Ex. 12). If an employee fails any one of the tests, he is not eligible for promotion. (See, for example, Gov. Ex. 38; Co. Ex. 77-83, 91-96).

53. The Bennett Mechanical Comprehension Test measures an individual's ability to perceive and understand the relationship of physical forces and mechanical elements in practical situations. (Co. Ex. 3-C, p. 2). The PTI Verbal Test basically measures an individual's vocabulary and the PTI Numerical Test basically measures an individual's ability to add, subtract, multiply and divide. (Co. Ex. 3-E, p. 3). The Short Employment Tests include a verbal test, an arithmetic test and a clerical test. The verbal test measures vocabulary, the numerical test measures one's ability to add, subtract, multiply and divide, and the clerical test measures the individual's ability to locate and verify names in alphabetical lists and to read in code the amount entered opposite that name (Co. Ex. 3-D, p. 1). The General Clerical Test is subdivided into three groups: the clerical, the numerical and the verbal. The clerical measures an individual's speed and accuracy in performing routine clerical tasks; the numerical measures an individual's ability to perform numerical tasks commonly found in clerical work; and the verbal measures language skills which are important to clerical performance. (Co. Ex. 3-A, p. 2).

54. All such tests were obtained from the Psychological Testing Company, one of the nations largest test publishing houses. Each was professionally developed under standards promulgated by the American Psychological Association, requiring accurate content, individual testing of each test item, testing of the final test, and reliability

studies by professional psychologists who are members of the American Psychological Association. None of such tests were designed or intended to discriminate because of race or color, nor were such tests given or acted upon for such reasons.

55. As a general rule, black people score significantly lower than do white people on aptitude and intelligence tests of the type used by Georgia Power Company. Research indicates that in some type jobs they also perform less well; in others, they perform equally well with whites.

[TEST SCORES COMPARED]

56. The test scores of Georgia Power Company employees tested since 1968 indicate that blacks score from nine to 12 points lower than do whites on the tests used by Georgia Power Company. (Gov. Ex. 12).

57. When the Company began its testing program in 1963, it used norms or cutoff scores which were developed by the test publishers through testing personnel in the electrical utility industry. The original cutoff scores or norms were used during the first year of the testing program on an advisory basis only. (Co. Ex. 1-A, p. 4). To establish cutoff scores or norms for the Company, John Hawkins conducted a study in which test scores and performance evaluations on approximately 300 employees were studied, and it was determined that there was a positive relationship between test scores and job performance ratings. The Company altered its norms or cutoff scores as a result of this study. (Co. Ex. 1-A and 1-B). John Hawkins conducted this study in the manner prescribed by professional psychologists by comparing test performance with supervisory ratings of employees.

58. Under guidelines promulgated by the Equal Employment Opportunity Commission, an employer may use a test which has the effect of excluding significantly

larger numbers of blacks than whites only if the test has been shown to be a valid predictor of job performance. (Revised Guidelines for Employee Selection Procedures, 35 Fed. Reg. 1233, 29 C.F.R. 1607).

59. Within the psychological profession, there are several recognized methods of validating tests. Primary amongst them are the "correlation analysis" and the "discriminant analysis." Each is considered legitimate, reputable and ethically acceptable if performed within the American Psychological Association standards. Each endeavors to measure the best and poorer test scores against the best and poorer in job performance.

60. Under the "correlation analysis" method, correlation coefficients are computed using standard mathematical formulas, based upon norms for the general population, and those coefficients represent the degree of relationship between test scores and job performance, as built on a plotted bell curve of normal probability. Fisher's tables used in the computation assume a normal distribution within the group examined. Consequently, the use of the sample on a group restricted with respect to talent or test scores, while a mathematical indicator of qualify therein, decreases the incidence of statistical significance. Stated differently, the larger and more unrestricted group examined, the greater its reliability. When used on a restricted group, the greater the chance for deviation from the norm.

[DISCRIMINANT ANALYSIS]

61. Under the "discriminant analysis" method, job and test performance are compared by groups—high, average, low, etc.—in each category and on that basis a prediction can be made as to whether a particular person falls within a performance group from test scores. If the group is already classified, it also can be used to predict placement within the group, although it is less reli-

able for measuring individual quality compared with the norm. The use of this method is sometimes preferable when the group examined is small or already restricted by terms of experience, education and the like.

62. The Equal Employment Opportunity Commission measures validity under the correlating coefficient method by prescribing a statistical significance at a 95% level of confidence. Stated another way, this means that there must be no more than one chance in 20 that the relationship between test scores and job performance occurred by chance. This means that the results must score 95% on the "chance" tables. No variance is admitted from such a standard. A 95%-5% score or better is deemed valid; a 94%-6% score or lower is deemed invalid.

63. Under this rigid standard, there is no test known or available today which meets the Equal Employment Opportunity Commission requirements for any industry. Moreover, there was no test existing in 1966, on the effective date of the Act, which met such a test. According to the government's experts, it would require at least two years to develop a testing program to meet all the criteria for validity. Nor has the profession yet been able to develop any test which is "culture free" in that it automatically makes allowances for prior cultural disadvantages of a minority group.

Consequently, the three tests utilized since 1963 by the company do not meet the validity tests prescribed by Equal Employment Opportunity Commission using the "correlation analysis" method.

64. In December, 1968, Georgia Power Company began a study of its testing program to determine whether or not the tests the Company used were significant predictors of job performance. This study was completed shortly before trial began (Co. Ex. 75), using the "discriminant analysis" technique.

['VALIDITY' OF TESTS]

65. The main body of the validation report shows that, of the tests used by Georgia Power Company, the Bennett Mechanical is "valid" for seven of nine classifications on which the study was made, the PTI Verbal is "valid" for four of eight classifications, and the PTI Numerical is "valid" for six of eight classifications.

66. Accordingly, the testing program used by Georgia Power Company is of significant help to the Company in predicting the job performance of applicants for employment and promotion, inasmuch as it has been demonstrated that there is a positive correlation between test results and job performance. This positive correlation was demonstrated for all classifications within the lines of progression with the exception of the job classifications *switchboard operators, garage mechanics, coal equipment operators, and helpers.*

67. The PTI Verbal Test bears a reasonable relationship to the ability to read and understand words and to comprehend written instructions.

68. Bargaining unit jobs at Georgia Power Company require that employees possess the ability to read and comprehend manuals and other forms of written materials in order to perform their duties. Non-bargaining unit classifications principally require individuals to perform clerical work involving accounting, filing and secretarial duties.

69. Employees hired by the Georgia Power Company normally progress within a reasonable time to the journeyman level classification.

In some cases, the validation study shows validity for the tests for some jobs in a particular line of progression, but admitted that the tests were not valid for other jobs in the same line of progression. (Co. Ex. 2, 75).

It appears that the tests show validity at some point in each line of progression.

70. At least 65 black employees have been denied promotion for failure to pass the tests since January 1, 1967. (Gov. Ex. 38).

[TEST CONDITIONS]

71. In terms of test conditions for previous employees, they also vary by location and management. In some instances, personnel administering tests have mistakenly set time limits on the Bennett Mechanical Test, which has no limit. In some instances, employees have been administered tests in the presence of an official in his office, or in a room by himself; some employees are tested singly and some jointly; some have been given notice a day or two prior to testing and some only an hour or less. They have been tested at various hours of the day. Again, most of the employees in this category are black. However, there is no discriminatory effect in testing conditions except with each other. There is no showing that any whites so tested are treated differently.

Testing conditions at time of hiring appear to be uniform between whites and blacks. The fact that testing conditions for previous black employees vary from division to division does not show racial discrimination with whites, nor is it motivated by a pattern or practice of racial discrimination. Uniformity is correctable by firm company policy or through the collective bargaining process.

High School Education

72. Significantly greater numbers of blacks than whites do not have high school educations.

In 1969, 82 percent of white 20-21-year olds in the United States had completed high school, but only 58

percent of the Negroes in this age group had done so. The gap in educational attainment was even greater in the Southern states. In the 25-44-year old age group, 64.7 percent of the white males had graduated while only 35.0 percent of the blacks had completed high school. Sixty-three percent of the white females in this age group graduated as opposed to 34.7 percent of the Negro females.

In the Atlanta area, where a large part of the Company's hiring is done, the most current figures show that this disparity in educational achievement also exists in Atlanta. Of whites over 18, 70.7 percent had completed high school as compared to 46.2 percent of blacks. Sixty-six point three percent of white males over 25 had completed high school whereas only 37.2 percent of the blacks had graduated. Seventy-one point seven percent of the white females in this age group have graduated while only 43.1 percent of black females have completed high school (Gov. Ex. A, B, C).

73. Georgia Power Company employs large numbers of non-high school graduates hired prior to 1960 who have progressed to journeyman or higher classifications. For example, in the Production Department, and in the Atlanta and Macon Operating Divisions, there were 339 white employees, or 28.4% of the total number of white employees, who did not have high school educations as of January 16, 1970. (Gov. Ex. 17).

74. Approximately 80 percent of the graduates now performing skilled jobs for Georgia Power Company were hired prior to 1950. The following chart depicts, by decade of hire, the number of non-high school graduates employed in the steam plants, the Atlanta and Macon Operating Divisions, and the General Repair Shop. These numbers include only those men who presently are working in positions for which a high school education has

been required since 1960. (The figures are based on Government Exhibit 17 as corrected by Company Exhibit 9.)

NON-HIGH SCHOOL GRADUATES
PRESENTLY WORKING IN SKILLED POSITIONS

Decade of Hire	Steam Plants	Atlanta Division and General Repair Shop	Macon Division	Totals
1920's	2	5	0	7
1930's	7	16	4	27
1940's	84	94	49	227
1950-55	10	25	8	43
1956-60	3	21	0	24
Totals	106	161	61	328
Total Present Employees	831	1078	324	

A vast majority of the men referred to in the chart reached their present job before or very shortly after the imposition of the high school education requirement. For example, in the Production Department's steam plants, only 22 of the 106 non-high school graduate employees reflected above have received promotions since 1960. These 22 men received a total of 23 promotions as compared with a grand total of 688 promotions received by all employees working in the Production steam plants. (Gov. Ex. 17).

[ABILITY TO PERFORM]

75. Several white journeymen whose education level averaged 7th grade testified that they were able to perform their jobs despite their limited education, and that prior experience and outside study had aided them significantly in performing their duties.

76. Several black employees without high school educations testified that they had taken home study courses, or that they had prior experience doing the type of work

Georgia Power Company required in higher classifications. However, they are prevented from progressing from Laborer to those higher classifications because of their lack of a high-school education.

77. Georgia Power Company has collected no data or made no study on whether or not the possession of a high school education is necessary for the performance of any or all jobs within the Company, or whether or not there is a significant correlation between possession of a high school education and job performance.

78. Most job functions above entry level, particularly in the higher classifications, require the ability to read and understand a mass of written technical data in the form of maintenance and operation manuals, intra-company training bulletins, written procedures and policies and the like. The presence of such abilities is more prevalent in high school graduates than non-graduates.

79. The electrical industry has undergone rapid technological development during the last 25 years which have resulted in the use of more complex and sophisticated machinery. The new production facilities being constructed by the Company rely upon sophisticated electronic equipment and computers, and the Company presently has under construction its first nuclear-powered facility. Operators of the nuclear facility will be licensed by the Atomic Energy Commission. The Company is preparing the persons that will operate the nuclear equipment through a course at the Georgia Institute of Technology, and the training program for these individuals will consist of approximately 18 to 20 months of classroom work and actual experience in operating a nuclear reactor.

80. Due to the increased demand for electrical energy, the Company now transmits up to 500,000 volts on a transmission line as compared to a capacity of 44,000

volts in the past. This has resulted in the requirement that linemen be able to understand and utilize sophisticated safety techniques and equipment to avoid injury to themselves and others, and to insure the efficient operation of the Company's system.

[TRAINING PROGRAMS]

81. In order to equip employees with the necessary skills to perform jobs in the production, distribution and transmission of electricity, the Company has instituted numerous training programs. The Company uses its trained personnel in forming a cadre for new production facilities due to the fact that it is impossible to hire trained individuals from outside of the Company who have the ability to perform the job tasks required in the production, transmission and distribution of electricity.

82. The Company's employees are at times required to attend courses conducted by manufacturers with respect to the operation and maintenance of equipment.

Employees at the Company's steam production facilities are required to be able to read and comprehend various types of manuals with respect to the maintenance and operation of the equipment at these facilities. Employees performing maintenance functions such as electricians and mechanics are also required to be able to read electrical blueprints and diagrams.

Unions

83. Defendant local unions have at all times been parties to the collective bargaining agreement with the Company which provides for the system of granting promotions on the basis of job and departmental seniority.

84. Defendant unions have had knowledge of each of the various practices which form the basis of this suit. They have known of the discriminatory impact of the job and departmental seniority system and are aware of the educational and testing requirements of the company.

85. The defendant unions are fully integrated and have been for some time. There is no evidence that union officials have failed to process grievances on account of race, or discriminated in any manner in the handling or processing of any complaint by a black member. To the contrary, the evidence affirmatively shows that black members have been assisted in regaining jobs, securing additional tests, etc. on the basis of informal complaints and without the necessity of filing formal grievances.

[EARNINGS LOWER]

86. As previously found, the job classifications of Laborer, Janitor, Porter, Maid, Coal Sampler and Switchman, which blacks have traditionally held, pay lower than the lowest paying white job. (Gov. Exs. 1, 2). Since the majority of blacks have held only laborer's jobs, and since virtually all whites have held higher paying jobs, it follows that earnings of black employees, as a class have been considerably lower than earnings of their white contemporaries, and lower than some later hired whites.[3]

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[3] Typical examples are to be found in the production department, where most black employees are located. For example, Charles King, who was promoted to Coal Equipment Operator as a result of the Court's Preliminary Injunction, earned $19,253.05 from July 2, 1965, to January 16, 1970. N. A. Bryant, white, who was hired as a Coal Equipment Operator five months after King, earned $35,763.15 from July 2, 1965, to January 16, 1970. M. L. Thompson, white, who was hired as a Laborer on August 9, 1963, and who was subsequently promoted to Coal Equipment Operator, earned $24,715.65 between his hire date and January 16, 1970. L. M. Kitchens, who was the last white person hired before July 7, 1965, who subsequently became a Coal Equipment Operator, earned $27,871.20 from July 2, 1965, to January 16, 1970. Clayton Marcus, who was promoted to Auxiliary Equipment Operator as a result of the Court's Preliminary Injunction earned $19,253.05 from July 2, 1965, to January 16, 1970. D. J. Johnson, who was hired as an Auxiliary Equipment Operator one week after Marcus, earned $33,566.85 between July 2, 1965, and January 16, 1970.

CONCLUSIONS OF LAW

I. Complaints of General Discriminatory Patterns and Practices by the Company.

In reiteration of the earlier holdings of the court, it is apparent that all black employees were restricted to the jobs of Laborer, Janitor, Porter and Maid prior to July 29, 1963, and that they were effectively "locked in" to such positions until that time. This is borne out statistically as well as by direct evidence. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 2 FEP Cases 895 (10th Cir. 1970); United States v. H. K. Porter Company, 296 F.Supp. 40 at 65, 1 FEP Cases 515, 70 LRRM 2131 (N. D. Ala. 1968). While a limited number of whites were also hired into those classifications, most of them speedily passed out of the classification while no blacks did. Additionally, large numbers of white were concurrently hired into the higher job classifications closed to blacks. The comparison here is not with the few whites who worked solely as Laborers, but with the whites who transferred out or entered into the higher classifications denied black employees. Griggs v. Duke Power Company, 420 F.2d 1225 at 3, 4, 2 FEP Cases 310 (4th Cir. 1970). Insofar as black employees hired before July 29, 1963, the effect of the job classification seniority system incorporated into the Collective Bargaining Agreement prior to the Court's order of October 5, 1970, was to keep black employees perpetually beneath contemporaneously hired whites. This is true because all white employees hired prior to July 29, 1963, solely because of their race, have freely worked in and accumulated seniority in job classifications necessary for promotion to higher-paying jobs while prior to July 29, 1963, all black employees were prevented, solely because of race, from accumulating such seniority. The present effect of that practice made those black employees unsuccessful in bidding against white employees for higher paying jobs and is therefore a "term, condition and privilege of em-

ployment" which discriminates against black employees on the basis of race in violation of the Act. United States v. Local 189. United Papermakers and Paperworkers, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969) cert. den. 397 U.S. 919. 2 FEP Cases 426 (1970); Long v. Georgia Kraft, —— F.Supp. ——, 2 FEP Cases 658 (N. D. Ga. 1970) (62 CCH Lab. Cases ¶ 9437).

It is clear that the loss of time spent prior to July 29, 1963, in the "frozen" classification must be credited toward any future promotion to avoid the discriminatory effect of the company practice when a black employee competes with a white employee. Relief to such effect will be permanently granted.

[PLAINTIFFS' CONTENTION]

(1) In addition to this conclusion, however, the plaintiffs argue that no significant number of black employees was initially assigned to any classification between July 29, 1963, and January 16, 1970, other than Laborer and that such fact demonstrates a continuing pattern of discrimination on the part of the company. This involves a total of 189 blacks hired during the period. Of these, 70 possessed high school educations and 28 subsequently passed the aptitude tests. Thus 28 of the total qualified under the requirements then in use by the company, for positions higher than Laborer. Of these, only five were employed at the higher position. By way of contrast, during the same period, 627 whites were hired into the Production Department and Atlanta and Macon Operating Divisions, of which 534 possessing requisite qualifications began at higher positions; the remaining 93 began in the Laborer's classification.

Over and beyond the question of the validity of educational and testing requirements,[4] plaintiffs contend that

[4] Discussed in Part II below.

those facts together with the overall policies of the company demonstrate continued racial discrimination. As seen, 28 black employees could have been hired into a higher classification under the then current standards. The remainder were not so qualified and many signed waivers. Yet there is no showing that there were 28 openings at the time or that there were any openings at all into which they could have immediately been hired, at any other job. As seen, effective on July 29, 1963, blacks were free to transfer out of a Laborer's classification on the same basis as white and in preference to a new hiree. As of April 29, 1969, time spent as a Laborer within a section counted towards job seniority within the section for blacks and whites then employed as Laborers. Conceding this state of affairs, plaintiffs argue that a transfer was "onerous" in that a Laborer lost his accumulated seniority upon transfer and must run the risk of discharge or resignation in the event he is deemed incompetent in the new classification.[5] Be that as it may, the system applied equally to whites and blacks. If it is onerous to one it is to the other. In the absence of a showing that some available transfer was denied a black employee in preference to a junior white (and none is shown here), the court finds no racial discrimination in the company's post-July 29, 1963, assignment policies. To the contrary, blacks and whites concurrently hired since that time are subject to equal treatment with equal privileges and rights. The evidence demonstrates no variance to that practice. The wisdom of such policies, of course, is not for the court to decide in a Title VII suit,

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[5] This is quite a different situation from one in which the transfer from one category to another is prohibited. Cf. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 2 FEP Cases 895 (10th Cir. 1970).

but is left to the judgment of management and, by strong national policy, to the processes of collective bargaining.[6]

[RECRUITING POLICY]

(2) The matter of assignment is a separate question from that of hiring and all that has been said before relates to the former. In the context of the pre-trial issues, the hiring practices of defendant are apparently lumped into "recruiting." In the court's view, there is a difference. "Recruiting" relates to affirmative efforts by the company to attract applicants, while "hiring" relates to the processing of applicants regardless of their source. In this case, plaintiffs contend that the employment of applicants referred by regular employees constitutes discrimination. See Lea v. Cone Mills Corp., 301 F.Supp. 97, 2 FEP Cases 12 (D.C. N.C. 1969). However, the court sees nothing sinister in this respect. Advertisement of existing vacancies by word-of-mouth on the part of company employees has been the best means for recruitment, and often for promotion, from time immemorial. It has been done by both blacks and whites in this company. Even if it were harmful, there is no known way to halt it. The mere fact that a company's personnel has a majority of one race or another does not make such practice chargeable to the employer as a discriminatory act. Only if some preference were given the white referrals could the question rise to the point of decision. Nor is there any significance in the places of conducting interviews for possible management personnel. In short, the court finds no evidence substantiating a racially motivated policy of recruiting on the part of the Company.

However, when it comes to hiring, there is proof of unlawful acts. While there is no evidence that these prac-

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[6] See NLRB v. Insurance Agents International Union, 361 U.S. 477, 45 LRRM 2705 (1960); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964); Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

tices are the result of a company-oriented policy, it is apparent to the court that some of its supervisory personnel have unilaterally engaged in acts to discourage, confuse, and bypass blacks in favor of whites. Paramount amongst them are those instances wherein an apparently qualified black has been informed that there were no openings at all and a white is hired shortly thereafter, or the black's application is received when there is no opening, but never referred to when the job opportunity occurs. The company's frequent practice of hiring white employees, when the applications of equally or better qualified blacks are on file, is a violation of the Act. Likewise, the Company's practices of informing black applicants that no openings are available when in fact vacancies are available; of informing blacks that vacancies rarely occur when in fact they occur often; of informing blacks that they must begin as Laborers when in fact a large number of white employees begin at a higher classification; of telling black applicants that they will be called if a vacancy occurs and failing to call them; of failing to inform black applicants that they should apply at a different location for certain jobs in which they express interest constitute violations of the Act. See Local 53 v. Vogler, 407 F.2d 1047, 1 FEP Cases 577, 70 LRRM 2257 (5th Cir. 1969). Relief in this respect will be granted.

(3) Of course, the demonstrated past practice of compensating black employees in the Construction Department for per diem on a different basis and rate from that afforded white crew members while working on the same out-of-town jobs is discriminatory and, as such, a violation of the Act for which relief will also be granted.

II. Complaints of Discriminatory Educational and Testing Requirements by the Company.

(4, 5, 6) Of primary concern in this litigation is the utilization by the company of the requirements of a high

school education and the passing of certain aptitude tests as prerequisites to employment (absent a waiver) or transfer/promotion into all but the lowest classifications. The relevant part of the statute [42 U.S.C.A. § 2000e-2(h)] provides:

> "nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The pertinent authority is almost all bound up in the case of Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (Mar. 8, 1971), although there are hints of the problem in previous holdings by lower courts. In context of this case Griggs must be examined in detail. At the outset, the court has determined that there is no element of willfulness in the sense that the tests were conceived, "designed or intended" with a view towards racial discrimination. However, under Griggs specific intent and motive is not a necessary element in a Title VII suit involving this issue. See also Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070 (10) (5th Cir. 1969); Clark v. American Marine Corporation, 304 F.Supp. 603(4), 2 FEP Cases 198 (E.D. La. 1969). The question remains, however, whether the requirements are "used" and result in racial discrimination. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." (at 431).

[RECORD REPLETE]

Of course, in Griggs the diploma and test requirements were considered in a vacuum in that the record was silent as to whether either requirement "bears a demonstrable relationship to successful performance of the jobs for which it was used." Here, at great length and trouble, the government sought to disprove their validity and the defendant to prove their validity in this regard. The record here, unlike Griggs, is replete with testimony, studies, statistics, and expert opinions on both sides. In this controverted context, the mission of the court is to determine whether either is "demonstrably a reasonable measure of job performance." (at 436).

Unquestionably, blacks as a group are penalized by the requirements in that they have not yet reached the levels of achievement in either area. By reason of prior cultural deprivation or otherwise, they simply have proportionately fewer high school graduates and lower test scores. However, "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (at 430, 431). "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of performance. Congress has not commanded that the less qualified be preferred over the

better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (at 436). Thus, requirements reasonably related to job performance are permissible; otherwise, they are not. See also Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980 at 988, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969); United States v. Sheet Metal Wkrs. Int. Ass'n., Local U. 36, 416 F.2d 123 (5), 2 FEP Cases 127 (8th Cir. 1969); United States v. H. K. Porter Company, 296 F.Supp. 40 (38-43), 1 FEP Cases 515, 70 LRRM 2131 (N. D. Ala. 1968); Arrington v. Massachusetts Bay Transportation Auth., 306 F.Supp. 1355, 2 FEP Cases 371 (D. Mass. 1969); Penn v. Stumpf, 308 F.Supp. 1238 at 1242, 1243, 2 FEP Cases 391 (N.D. Cal. 1970); Hicks v. Crown Zellerbach Corporation, 319 F.Supp. 314, 2 FEP Cases 1059 (7, 8) (E. D. La. 1970); Colbert v. H. K. Corporation, 2 FEP Cases 951, (No. 11599, N. D. Ga. 1970) (on appeal).

Examined in light of Griggs, the Court concludes from the evidence presented that (1) the aptitude tests are lawful and (2) the high school education requirement unlawful.

[TESTS LAWFUL]

In connection with the tests, they are "professionally developed." They were "adopted after meaningful study of their relationship to job performance ability" long before the Act was effective. They are "predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job." They "fairly measure the knowledge or skills required by the particu-

lar job or class of jobs which the applicant seeks or which fairly afford the employer a chance to measure the applicant's ability to perform a particular job or class of jobs."[7] They have been validated in a professional manner.[8] They have been made applicable only to jobs at the "second level" and up in lines of progression where they are relevant at some or all categories.[9] By no means are they perfect. Hopefully, future studies and developments in the field of psychological testing will produce a program even more meaningful to all employees,

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[7] See Equal Employment Opportunity Commission Guidelines on Employment Testing Procedures, August 24, 1966, at § 1607.4(c).

[8] It is true that the validation does not meet the rigid requirements recently set out by Equal Employment Opportunity Commission, 29 CFR § 1607. (August 1, 1970). However, the rather startling evidence offered by the government was to the effect that there was no test known to exist or yet devised which could meet such standards. The court concludes that Section 703(h) was not intended by the Congress nor interpreted by the Supreme Court in such meaningless fashion. Psychological testing is itself a new inexact science. Reputable able people (here, two former partners) readily disagree over the ultimate validity of almost any test when related to a particular job or employer. In Griggs, validity is a reasonable, not absolute, requirement. It is inescapable that the Equal Employment Opportunity Commission regulations, while on the whole helpful, are not binding in this respect. See the common sense approach taken in United States v. H. K. Porter Company, 296 F.Supp. 40 at 74, 75, 76, 1 FEP Cases 515, 70 LRRM 2131 (N.D. Ala. 1968).

[9] It was conceded by the government at trial that a test, if valid, could properly be used at a lower level if the aptitudes it reflects are needed at higher levels in the line of progression. To rule otherwise would play havoc with the collective bargaining process. However, it was argued that the separate tests should be fragmented and each part applied only to the specific job to which it is applicable. Further, that the tests be weighed in favor of black employees and discounted as a promotion factor. Under the evidence presented, it would be impossible for the court to do so with any degree of confidence nor are such matters believed to be realistic or required by Griggs.

black and white. At present, however, for the reasons stated they are deemed permissible and not a practice in violation of the Act.

Test administration, as seen, is not uniform and it can and ought to be regulated as to times, places, opportunities, conditions and the like either by company policy or as part of the collective bargaining agreement. The lack of uniformity has presented hardships and confusion on that small category of employees, almost totally black, who were hired prior to 1963 or employed under a waiver and who since have sought to qualify under the tests. Under the facts, no discrimination in favor of whites is shown in this regard and there is no violation in this respect. However, to insure that all employees are aware of the testing requirements and the need to be tested, the court will order all employees of the company to be notified and tested or retested as the case might be within 60 days of the issuance of a final decree.

[EDUCATIONAL REQUIREMENT]

As to the high-school education requirement, the facts are quite different. At best, the only justification for this requirement is the obvious eventual need for above-average ability to read and comprehend the increasingly technical maintenance manuals, training bulletins, operating instructions, forms and the like demanded by a sophisticated industry. These qualities are not unexpectedly more prevalent in high-school graduates than non-high-school graduates. However, it cannot be said that a high-school diploma is a business necessity. As related in Griggs, "History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees." (at 443). Wed as we are to the Abe Lincoln-Horatio Alger tradition in this nation, such a requirement except in excep-

tional cases would be hard to justify.[10] Without that tradition, we would be a poorer nation. Here, countless employees without the diploma have mastered the need through self-study, through adult education courses, and through perseverance and have advanced to the highest technical levels in the company. In such context, the high school education requirement cannot be said to be reasonably related to job performance. This is not to say that such qualities are not desirable—the need is there in this company's business; it simply means that the "diploma test" cannot be used to measure the qualities. Many high school courses needed for a diploma (history, literature, physical education, etc.) are not necessary for these abilities. A new reading and comprehension test or continued use of the PTI Verbal Test might legitimately be used for this job need. However, for the reasons stated, the high school education requirement cannot stand and constitutes a practice used to discriminate in violation of Title VII.

III. Complaints of General Discriminatory Patterns and Practices by the Unions.

The defendant unions are, of course, parties to the Collective Bargaining Agreement. While no showing of any conscious intent has been made, as part and parcel of the scheme of job seniority which has resulted in racial

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[10] At trial, the question whether a private employer has the basic right to form a business and limit by choice or whim his employees to college or high school graduates, or to graduates of a particular trade school, secondary or college institution, or special training course, or even to handicapped persons or veterans, concerned the court. Apparently, Griggs pretermits any consideration of the question if the practice results in racial discrimination. It is assumed that it might be possible to do so providing blacks and whites within each category are employed, but the requirement regardless of the employer's whim, must apparently reasonably relate to the business.

discrimination to certain black employees as discussed in Part I, supra, and permitted the educational qualifications discussed in Part II, supra, each union is a proper party to suit and the relief granted in this respect. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3039 (5th Cir. 1969); Irvin v. Mohawk Rubber Company, 308 F. Supp. 152, 2 FEP Cases 349 (E. D. Ark. 1970). Otherwise, there is no evidence of any discrimination by the defendant unions and further relief is denied.

IV. Relief and Remedy.

Heretofore, as seen, the court has ordered relief to those black employees hired prior to 1960 who had no high school education (Class 1), to those black employees hired prior to August 19, 1963, who have not passed the Company's aptitude tests (Class 2), and to all black employees hired prior to July 29, 1963, who possessed a high school education and who had passed the company aptitude tests (Class 3). By reason of the holding in Part II hereof, Class 1 and Class 2 are effectively placed in one category, to wit: all black employees hired prior to July 29, 1963, who had not passed the company aptitude tests. As thus additionally defined, the same relief will be made permanent. The claims of individual plaintiffs will be discussed below in Part V.

In the government's suit, however, over and beyond such remedial injunctive relief, it is contended that all black applicants and all black employees of the company in any class affected by this order, for all time, whether an individual plaintiff or not, should be individually compensated and relieved by way of back pay, retroactive seniority to date of application for hire, and the like. In the court's view, such massive payments and specific retroactive relief is not contemplated in a suit by the Attorney-General under Section 707(a) of the Act (42

U.S.C.A. § 2000e-6), nor in a class action generally.[11] The scheme envisioned by the Congress in Title VII relief was of two types: individual and class relief; the former to be brought by each aggrieved person after exhaustion of his administrative procedures, the latter by the Attorney-General. The courts have engrafted general injunctive class relief to the individual suits by reason of its practicality in administering the Act. However, the basic scheme remains the same. In individual cases, after proper compliance with the administrative prerequisites presumably fashioned to encourage circulation and to insulate the court from inundation by a mass of detail in one suit, the court is authorized to give specific relief.

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agencies, or labor organiza-

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[11] Unwittingly, the court forecast this result almost three years ago. "Those aspects of the case dealing with individual redress for the past acts of discrimination are not suited for trial as a class action. The aspects of the case dealing with individual acts of discrimination and seeking individual redress do not support a class action. Whereas, some issues are by their nature well suited to disposition in a class action. For example, the desegregation of comfort facilities or other practices that are company wide are particularly suited for trial in class action. Plaintiffs have sought both general class relief, i.e., injunction against discriminatory practices, and individual relief for specific acts of discrimination, i.e., as to transfer, promotion and back-pay. See the lucid discussion for the rationale underlying class actions attacking a system of discrimination in Potts v. Flax, 313 F.2d 284 (5th Cir. 1963)." King v. Georgia Power Company, 295 F.Supp. 943 at 948, 1 FEP Cases 357, 69 LRRM 2094 (N.D. Ga. 1968).

> tion, as the case may be responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a)." [42 U.S.C.A. § 2000e-5(ag)].

In Attorney-General suits, no such remedies are prescribed. Under 42 U.S.C.A. § 2000e-6(a)(3), he is authorized in a pattern or practice case to file a complaint:

> "(3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

While consistent, the presence of one remedy does not demand the other. Neither is dependent on the other. See Parham v. Southwestern Bell Telephone Co., 433 F.2d 421(5), 2 FEP Cases 1017 (8th Cir. 1970). Primarily for this reason, the court concludes that such relief is not authorized and, in the discretion of the court, certainly not demanded. Even injunctive relief is apparently not demanded in Title VII suits. See Parham v. Southwestern Bell Telephone Co., Supra at (6)(7). Upon a showing of a discriminatory practice, most courts have utilized prospective remedies for class-type relief. See Local 189, United Papermakers & Paperworkers v.

United States, 416 F.2d 980 at (3), 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969); Clark v. American Marine Corporation, 304 F.Supp. 603, 2 FEP Cases 198 (E.D. La. 1969); Hicks v. Crown Zellerbach Corporation, 319 F.Supp. 314, 2 FEP Cases 1059 (E.D. La. 1970); Long v. Georgia Kraft Company, —— F.Supp. ——, 2 FEP Cases 658 (N.D. Ga. 1970) (62 CCH Lab. Cases ¶ 9437). The idea of a retrospective lump sum award to equate income to all persons in the class was apparently rejected outright in Clark.

[LIMITATIONS QUESTION]

Moreover, there is some concern over the question of limitations. The Act itself has a built-in 90 day limitation in individual claims in that the charge must be filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice. 42 U.S.C.A. § 2000e-5(d). Suit must be filed within 30 days after receipt of the "suit-letter." 42 U.S.C.A. § 2000e-5(e). For the purposes of individual relief, each has been held to be jurisdictional. See Hutchins v. United States Industries, Inc., 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970); Culpepper v. Reynolds Metals Company, 421 F.2d 888, 2 FEP Cases 377 (5th Cir. 1970); Goodman v. City Products Corp., 425 F.2d 702, 2 FEP Cases 608 (6th Cir. 1970); King v. Georgia Power Company, 295 F.Supp. 943, 1 FEP Cases 357, 69 LRRM 2094 (N.D. Ga. 1968); Colbert v. H. K. Corporation, 295 F.Supp. 1091, 1 FEP Cases 632, 70 LRRM 2638 (N.D. Ga. 1968); Boudreaux v. Baton Rouge Marine Contracting Co., 304 F.Supp. 240, 2 FEP Cases 163 (E.D. La. 1969). To grant money damages to each member of a class in a suit by the Attorney-General would bypass all of these requirements imposed by the Congress.

Moreover, there is a respectable line of authority to the effect that the statute of limitations in Civil Rights cases; in the absence of a specified period, is governed

by state law. See Clark v. American Marine Corporation, 304 F.Supp. 603 at 611 n. 12, 2 FEP Cases 198 (E.D. La. 1969). Even if the Title VII requirements could be bypassed in gross in some manner, the claims for backpay sought in the government case would be limited by the state statute. See Ga. Code § 3-704, § 3-706.

Such sweeping awards also presuppose in the case of employees a valid opening and qualification by performance for the entire period by each and every member. It presupposes in the case of applicants a job vacancy and qualification by each and every member. There is no evidence on which to base such a conclusion.

For these reasons, the claims for back pay to employees and for retroactive seniority to any rejected applicant in the government case are rejected. This conclusion, however, does not deny the court the right to fashion innovative corrective relief to the class as a whole. See Local 53 v. Vogler, 407 F.2d 1047, 1 FEP Cases 577, 70 LRRM 2257 (5th Cir. 1969); Clark v. American Marine Corporation, 304 F.Supp. 603, 2 FEP Cases 198 (E.D. La. 1969). The suggestion of offering employment upon availability of new vacancies or openings to those applicants unfairly rejected is meritorious. Whether they desire to qualify under the new existing requirements is dependent upon each individual. At the least, however, the court can insure the opportunity to that class by way of injunctive relief without the necessity for proof in each individual case. It will be granted.

V. The Private Claims.

(a) In Civil Actions Number 11723 and 12185, the named plaintiffs are all black employees hired prior to 1963. None has passed the company aptitude tests. Some have endeavored to bid on job openings, but have lost their bids for failure to have a high school education or pass the aptitude tests. Recitation of additional facts is unnecessary for the purposes of this order.

In addition to the relief afforded the class they represent herein, the court will direct the following:

(1) From the record in this case and from the company files, counsel will ascertain the first bid made by each plaintiff since the effective date of the Act (or if an unsuccessful bid was made prior thereto, July 2, 1965, shall be deemed to be such date) for which they are now eligible under the terms of this decree.

(2) Such date will be compared with a date 90 days prior to the filing of the Equal Employment Opportunity Commission complaint by each plaintiff and the latest of such dates shall be deemed the "effective date" for purposes of this order.

(3) Each plaintiff will be allowed to bid the next available opening for which he is now eligible under the terms of this decree and insofar as 4(b) is concerned for the period of two years thereafter.

(4) Upon such bid being made and upon such person qualifying for the job he bids, he will be granted:

(a) Job seniority as of the "effective date" as defined in (2).

(b) Back pay from such "effective date", determined by the amount he would have made if successful in a bid for the job he then holds less the amount actually earned until the successful bid.

(5) In the case of those named plaintiffs who have successfully bid under the terms of the temporary orders of the court, the same benefits will be granted taking into account the date of the successful bid. 42 U.S.C.A. § 2000e-5(g).

[REJECTION OF APPLICANT]

(b) In Civil Action Number 14182, the plaintiff Jones was a rejected black applicant. On May 18, 1966, he

originally applied in the Augusta Division for the positions of "meter reader" or "appliance salesman." He was not tested or interviewed. He was told there was no openings in the Division. He was not told that he could apply for the same job in another Division. Subsequently, he went by the employment office eight or nine times and received the same advices to the effect that there were no vacancies anywhere. Nonetheless between June 13, 1966, and April 13, 1970, seven persons (5 white and 2 black) have been hired in salesmen positions at Augusta. Unknown but numerous others have been employed in such positions elsewhere. Since the date of Jones original application, at least five meter readers, all white, have been employed in the Augusta Division, some by transfer bids from other Divisions. Recitation of additional facts is unnecessary for the purposes of this order.

In addition to the relief afforded the class to which plaintiff belongs, the court will direct the following:

(1) The "effective date" of Jones application will be ascertained by counsel in the manner heretofore described.

(2) He will be afforded the opportunity to apply for an opening in accordance with the directions given all rejected black applicants under the terms of the decree.

(3) Upon application, qualification under the eligibility requirements of this decree, and acceptance of the position applied for, he will be granted:

(a) Job seniority as of the "effective date."

(b) Back pay from such "effective date", determined by the amount he would have made if accepted on the "effective date" and what he has actually made on the other jobs since that time to be determined from pay records of his other employers. 42 U.S.C.A. § 2000e-5 (g).

Attorneys fees:

Counsel in the private cases are clearly entitled to Attorneys Fees. 42 U.S.C.A. § 2000e-5(k). Clark v. American Marine Co., 320 F.Supp. 709, 2 FEP Cases 670 (E.D. La. 1970), aff'd 437 F.2d 959, 3 FEP Cases 155 (5th Cir. 1971). Some of these cases had extensive preliminary motions, a lengthy temporary hearing, as well as trial preparation and several pre-trials. At trial, the evidence was to the effect that, prior to the seven-day final trial, the attorneys had spent the following hours on the cases:

In Civil Actions Number 11723 and 12185:

Peter E. Rindskopf	214 hours.
Isabel Gates Webster	96 hours.

In Ciivl Action Number 14182:

John H. Ruffin, Jr.	20 hours.

The suggested minimum fees by the Georgia Bar Association are $25.00 per hour for attorneys admitted less than five years (Rindskopf) and $35.00 per hour for attorneys admitted over ten years (Webster and Ruffin). Of course, in these cases a tremendous amount of work both in trial preparation, trial, and briefing of which the plaintiffs are the beneficiaries, was conducted by the Department of Justice.

Considering the time spent, the results obtained, the prospective time contemplated in Part V, and all the facts and circumstances of the cases; and exercising the discretion vested in the court by the Act, attorneys fees are awarded as follows:

Mr. Peter E. Rindskopf	$6,500.00
Miss Isabel Gates Webster	$3,000.00
Mr. John H. Ruffin, Jr.	$ 850.00

Summary

By virtue of this opinion, the court finds:

PART I. (a) The defendant Power Company perpetrated a pattern and practice of racial discrimination insofar as:

(1) The seniority system in the Collective Bargaining Agreement as it affects all black employees hired prior to July 29, 1963.

(2) In its hiring policies and processing of black applicants.

(3) In its differentiation of per diem payments for black and white employees in the Construction Department.

(b) The defendant Power Company has not discriminated by:

(4) The seniority system in the Collective Bargaining Agreement as it effects black employees hired since July 29, 1963.

PART II. (a) The defendant Power Company has perpetrated a pattern and practice of racial discrimination insofar as:

(5) The requirement for a high school education instituted in 1960 as a condition for employment and/or promotion into all job categories.

(b) The defendant Power Company has not discriminated by race by:

(6) The requirement for passing aptitude tests instituted in 1963, as a condition for employment and or promotion into certain job categories.

(7) The administering of tests to black employees hired previously but who had not passed the tests.

[UNIONS]

PART III. (a) The defendant Unions have perpetrated a pattern and practice of racial discrimination insofar as:

(8) The seniority system in the Collective Bargaining Agreement as it affects all black employees hired prior to July 29, 1963.

(b) The defendant Unions have not discriminated by race by:

(9) The seniority system in the Collective Bargaining Agreement as it affects black employees hired since July 29, 1963.

(10) Its processing of grievances filed by black members of the respective Unions.

PART V. (a) The two defendants, Power Company and Unions, have discriminated against the plaintiffs in Civil Actions Number 11723 and 12185 by:

(11) The seniority system in the Collective Bargaining Agreement as it affects the plaintiffs, all hired prior to July 29, 1963.

(b) The defendant Power Company has discriminated against the plaintiffs in Civil Actions Number 11723 and 12185 by:

(12) The requirement for a high school education, instituted in 1960, as a condition for promotion into higher level positions.

(c) The defendant Power Company has discriminated against the plaintiff in Civil Action Number 14182 by:

(13) In failing to grant him the opportunity to qualify for a position for which he applied, while allowing whites to do so.

[DECREE ORDERED]

PART IV. In Civil Action Number 12355, counsel for the government and defendant Power Company are hereby directed to prepare a decree incorporating these findings and providing for

(1) Final injunctive relief for employees in Class 1, 2, and 3, in accordance with the temporary orders of the court dated October 5, 1970, providing for job competition with non-members of the class on a company seniority basis.

(2) Final injunctive relief for that Class of all employees in the company who do not possess a high school education, providing for job competition with non-members of the class on a company seniority basis.

(3) Final injunctive relief for all black applicants for employment with the company whose applications were rejected because of racial discrimination, providing for new preferential opportunities for employment hereafter. (The terms of this decree shall contain those applicable portions of the provisions specified in the Government's proposed decree under IV—HIRING AND ASSIGNMENT B. 1(a), (b), (e), (f), (g), (i), (j) and B. 2 (a), (b), and/or such other terms as may be agreed upon.)

(4) Final injunctive relief for all prospective black applicants for employment by deleting any requirement for a high school diploma as a condition to hiring for any job.

(5) Final injunctive relief providing for payment of per diem to all employees in the same category on an equal basis, without regard to race.

(6) The notification to every employee who has not passed the aptitude tests of his right to be tested and the testing of all who desire to be tested a reasonable

time after notification, all to be accomplished within 60 days.

(7) The posting of a copy of the final decree in a conspicious place on the employees bulletin board at each District and Section headquarters for the period of six months beginning 15 days after its final approval by the court.

(8) Dismissal of the case, but vesting jurisdiction in the court for purposes of enforcement for the period of two years.

(9) Each party has incurred extensive costs in this protracted litigation. Each party has sustained some of its positions. Accordingly, it is the direction of the court that each party bear its own costs.

In Civil Actions Number 11723, 12185, and 14182, counsel are directed to prepare final decrees, incorporating the findings and attorneys fees made in Part V of this opinion and providing for dismissal of the same upon the entry of final judgments in the case of each individual plaintiff.

Reasonable costs, if any were incurred by the individual plaintiffs, according to law are assessed in each case against the defendant Power Company and the defendant Unions, one-half to each.

To the extent that relief is stated herein in all cases, it is granted. All other relief is denied.

IT IS SO ORDERED.

Order

The defendant unions have filed a motion for reconsideration of the court's order dated June 30, 1971, in regard to attorneys fees. In the order, the Court failed to specify liability between the parties and the matter was inadvertently omitted, and no intention was con-

tained therein by the assessment of other costs 50%-50% in the private suits.

From the outset, it has been apparent that the unions' prime place in the litigation was as a necessary party under the Collective Bargaining Agreement under attack. On the evidence presented, that is their only place. A substantial issue in the litigation was the Company educational and testing requirements, with which the unions were only remotely connected. Counsel correctly points out that the defendant unions are not parties to Civil Action Number 14, 182 and not concerned with the acts complained of therein.

Accordingly, the previous order is amended to provide that all attorneys fees and costs be cast upon the defendant Power Company in Civil Action Number 14,182; and that attorneys fees for Attorney Rindskopf be assessed $5,000 on the Company and $1,500 on the Unions and for Attorney Webster $2,500 on the Company and $500 on the Unions; and that other costs, if any, in Civil Actions Numbers 11,723 and 12,185 be taxed one-half to the Company and one-half to the Unions.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-4073

D.C. Docket No. CA-12355; CA-11723; CA-12185
(Consolidated in D.C.)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GEORGIA POWER COMPANY, *et al.*,
Defendants.

CHARLES KING, *et al.*,
Plaintiffs-Appellants,

versus

GEORGIA POWER COMPANY, *et al.*,
Defendants-Appellees.

WILLIE C. MOREMAN,
Plaintiff-Appellant,

versus

GEORGIA POWER COMPANY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GEWIN, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants and plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

January 22, 1981

Issued as Mandate: Mar. 19, 1981

SUPREME COURT OF THE UNITED STATES

No. A-833

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner
v.
UNITED STATES, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 21, 1981.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 2nd day of April, 1981.

Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether on the record evidence in this case the Fifth Circuit, consistent with this court's decision in International Brotherhood of Teamsters v. United States, properly found a racially discriminatory purpose in the adoption, negotiation or maintenance of the seniority system requiring a determination that the seniority system is not bona fide within the meaning of § 703(h) of Title VII of the Civil Rights Act of 1964?

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Civil Rights Act of 1964, §703(h), 42 U.S.C. § 2000e-2(h) 2,4,9

No. 80-2117

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

UNITED STATES, et al.,

Respondents.

==========

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION

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SUPPLEMENTAL STATEMENT OF THE CASE*/

The facts of this case - filed in 1968 and captioned since 1969 as United States

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*/ Petitioners' presentation of the facts necessitates this supplemental statement.

v. Georgia Power Co.-[1/] arise out of a history of entrenched racial segregation in all aspects of employment at the Georgia Power Company. App. 34a. After reviewing all of the facts, the Fifth Circuit concluded:

> Considering the totality of the circumstances surrounding the seniority system, as found by the district court after trial, we hold the seniority system was not bona fide within the meaning of section 703(h).

Petitioner has set forth its own version of four of the factors which it asserts represent the basis of the Fifth

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1/ Technically the United States may not be respondent here. Since 1969 this case has been called United States v. Georgia Power Co. when two earlier filed private class actions, Charles King, et al. v. Georgia Power Co., Civil Action No. 11723, and Willie Moreman v. Georgia Power Co., Civil Action No. 12185, were consolidated with a pattern and practice action brought by the United States, Civil Action No. 12355. Only the private plaintiffs, King, et al., and Moreman filed notices of appeal leading to the Fifth Circuit decision of which petitioners now seek review. App. 6a.

Circuit's decision. Br. 4. A more accurate statement of the Fifth Circuit's findings - supported in the 1971 district court findings - is as follows:

a. The seniority system in fact provided upward mobility for whites and precluded advancement for blacks, although, on its face, it purported to operate equally upon all employees. App. 12a.

b. The differences in advancement opportunity for blacks and whites were not attributable to the existence of separate bargaining units. App. 13a.

c. The seniority system, established during an era of entrenced racial segregation, "tracked and reinforced the purposefully segregated job classification scheme." App. 14a.

d. Prior to 1969, the job classifications and sections were so organized were that black jobs were isolated from functionally related white jobs, exacting "seniority suicide" as the price of advancement out of any black job. App. 14a.

Respondents submit that these findings fully justify the determination that the seniority system was not bona fide within the meaning of section 703(h) of Title VII. But these were not the only findings pertinent to the Fifth Circuit's decision. The Court also reiterated the 1971 district court findings concerning special education and testing requirements imposed in 1963, shortly after the company lifted its policy of barring blacks from transfer out of the four black job classifications. These new requirements, applied to black jobs only, were obviously intended to inhibit transfer to white lines of progression.[2/] App. 2a.

2/ Under these requirements, persons in any of the black jobs were required to pass a battery of tests and to possess a high school diploma. App. 2a. At that time, over 45% of the company's foremen, supervisors and chief division operators lacked a high school diploma. App. 51a.

Respondents note, too, the district court finding that although in April 1969, the black laborer classification became an entry level job to certain white lines of progression, thereafter whites were hired directly into higher level jobs, violating the seniority expectations of senior black laborers. App. 78a.

REASON FOR DENYING THE WRIT

Petitioner Local Union No. 84, International Brotherhood of Electrical Workers, AFL-CIO, has challenged the Fifth Circuit's ruling on seniority. However, (1) the facts of this case do not warrant presentation of the questions framed by petitioner; (2) there is no conflict among the circuits[3/]; and (3) there is no conflict

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3/ Indeed, the decision below applies analysis that has been widely followed in other circuits. See note 4, infra.

with decisions of this Court because the Fifth Circuit reached a proper result on the facts of this case, and decided no important or new issues of law, but rather merely applied this Court's analysis in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) to a different set of facts.

ARGUMENT

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISION OF THIS COURT IN TEAMSTERS

I.

Petitioner's complaint about the decision of the Fifth Circuit is less

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3/ Continued

The Fifth Circuit noted a conflict among the circuits on the issue of whether a change in decisional law alone is a sufficient basis for upsetting final injunctive orders, but its decision in this case does not depend on its resolution of the issue. In any event, petitioner does not seek review on that question.

with that court's view of the applicable law or its application, but rather with that court's application of the facts found by the district court in 1971.

The linchpin of the first branch of petitioner's argument is the following statement in the 1971 decision:

> While no showing of any conscious intent has been made, as part and parcel of the scheme of job seniority which has resulted in racial discrimination to certain black employees as discussed in Part I, supra, and permitted the educational qualifications discussed in Part II, supra, each union is a proper party to suit and relief is granted in this respect. App. 115a.

As is apparent on its face, that statement deals with the question of whether or not the union was a proper party to the lawsuit. The statement, which the district court a properly classified as a conclusion of law, appears in a section of the decision captioned "Complaints of General Discriminatory Patterns and Practices by the

Unions." App. 115. It is not a finding that the seniority system was or was not bona fide. The major findings that relate to the bona fides of the seniority systems appear, appropriately, in those sections of the district court's findings of fact captioned "Contract", "Current Contract" and "New Findings". See App. 76-78 and 83-84. The portion of the decision relating to the union's participation suggests that the district court regarded the company as the motivating force behind the racial structuring of the seniority system. It found that the union knew of the discriminatory seniority structure and acquiesed in its maintenance. App. 103-04a.

We note too that at the time the district court wrote the quoted conclusion,

it was harmless surplusage since the question of whether a showing of intent was required in order to declare a seniority system in violation of Title VII was not legally relevant. App. 11. If it was, and if the finding of no "conscious intent" by the unions referred to the seniority system, that finding would have been clearly erroneous, given the positive findings of fact that lead unmistakably to the ultimate finding that this seniority system is not bona fide. App. 15a.

Petitioners seek to shore up its view of the district court's conclusion quoted above with what it contends are "other findings that indicated the seniority system was neutral and legitimate." Pet. 10. Its first contention that the union itself was integrated and represented black workers is of virtually no relevance on the question of the bona fides of the seniority

system. The finding of fact on which it relies to claim it represented black workers "fully" refers only to the union's actions in processing grievances. App. 104a. Its second assertion that the lines of progression were rational, Br. 10, actually supports a finding that the seniority system was not bona fide. The finding of rationality refers to the lines of progression as reformed after April 29, 1969, when the formerly isolated black classification of laborers was attached to the white lines of progression to which those laborers jobs were functionally related. App. 76a-78a. Petitioner's third assertion is nothing more than a statement that the system is facially neutral. The mere fact that the system is facially neutral does not always lead to a conclusion that the system is bona fide. See, Washington v. Davis, 426 U.S 229 (1976);

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977). As both the district court and the Fifth Circuit found, this system operated in a grossly unequal manner. App. 105a, 12a. That fact is strong evidence - and sometimes conclusive evidence - that the system is non-bona fide. See, International Brotherhood of Teamsters v. United States, 426 U.S at 241; Washington v. Davis, 426 U.S. at 241-2; and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S at 265-66.

II.

The second branch of petitioners' argument represents a barely perceivable shift of focus from the first. Here it contends that the four part test employed by the Fifth Circuit in James v. Stockham

Valves & Fittings Co., 559 F.2d 310 (5th Cir. 19770, conflicts with this Court's Teamsters dicision in that under the Fifth Circuit rule disparate impact is sufficient to prove discriminatory intent. Pet. 14. Respondents submit that petitioner has misconstrued the Fifth Circuit's application of Teamsters and there is no conflict between the Fifth Circuit's ruling and this Court's decision in Teamsters.[4/]

Initially, respondents note that this Court has held that under certain circum-

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4/ Nor is there any conflict among the circuits. The courts in other circuits that have considered the issue have followed the Fifth Circuit and used the same test or a similar one to determine whether seniority systems are bona fide. See, e.g., Sears v. Santa Fe Ry. Co., 25 FEP Cases 337, 341-343 (10th Cir. 1981); Patterson v. American Tobacco Co., 634 F.2d 744 (4th Cir. 1980), cert. granted ___ U.S. ___ (1981); Younger v. Glamorgan Pipe, 621 F.2d 96, 97 (4th Cir. 1980) (per curiam); Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978); Griffin v. Copperweld Steel Co., 22 FEP Cases 1113, 1118 (N.D. Ohio 1979); Chrapilwy v. Uniroyal, Inc., 15 EDP ¶ 7933 (N.D. Ind. 1977).

stances, disparate effect alone may be sufficient to establish discriminatory intent. See, Teamsters, 431 U.S. at 339. In any event, it cannot be fairly said that in this case the Fifth Circuit's decision was bottomed on evidence of disparate impact alone.

The Fifth Circuit considered the totality of the circumstances surrounding the seniority system, but paid particular attention to the four factors this Court deemed significant in Teamsters.[5/] It concluded that the Georgia Power seniority system was not bona fide. The Fifth Circuit's treatment of the factors con-

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5/ Petitioners concede that the four factors listed by the Fifth Citcuit in James v. Stockham Valves and Fittings Co., 559 F.2d 310, 35 (5th Cir. 1977), cert. denied, 434 U.S 1034 (1978) and applied in this case were deemed significant in this Court's analysis of the seniority system in Teamsters.

sidered is discussed below.

As to the first factor, the Fifth Circuit held that, while the seniority system at issue appeared to operate equally, " ... its facial neutrality was but a mask for the gross inequality beneath". The system in fact provided upward mobility for whites and precluded advancement opportunity for blacks.[6/] App. 12a. This

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6/ Petitioners appear to concede that the seniority system had this effect, although it points to one job traditionally held by white workers, meter-readers, which was unconnected to a line of progression. Pet. 14. Of course, there were over 100 other traditionally white jobs that provided advancement opportunity. Gov't Ex. 2, 8, 16. None of the traditionally black jobs provided for advancement opportunities, even though the job containing the largest number of blacks, laborers, was functionally related to several white lines of progression. There is no indication that the meter-reader classification is functionally related to any other job.

Court has held repeatedly that a statute (or rule), otherwise neutral on its face, must not be so invidiously applied as to discriminate on the basis of race. see, Washington v. Davis, 426 U.S at 241. Objective evidence that the law (or practice) bears more heavily on one race than another is important evidence supportive of the inference of invidious discriminatory purpose. Ibid.

The second factor considered by the Fifth Circuit, whether the seniority units are in separate bargaining units, informs the question of whether the evident disparate impact of the practice can be traced to some positive non-race related cause. Thus, as this Court noted in Personnel Administrator of Massachusetts v. Feeney, 442 U.S 256 (1979):

> If the (adverse) impact of this statute (veterans' preference) could

> not be plausibly explained on a neutral ground, impact itself would signify that the real classification made by the law was in fact not neutral.

442 U.S at 275. Respondents suggest then that it was not, as petitioner argues, "irrational," Pet. 15, to attach significance to the fact that this seniority system encompasses only one bargaining unit. Indeed, petitioner appears to recognize that the structure of the bargaining unit may be significant here. They point to the finding that the seniority units are made up of "functionally related jobs," Pet. 15, but decline to confess that until April 29, 1969, the traditionally all black classification of laborer was isolated from the white job classifications with which it was functionally related. App. 78a.

As to the third facor, petitioner concedes that the seniority system had its

genesis in a period of overt racial discrimination, but suggests that the seniority system was untainted by the experiences of that era because it was "irrelevant to the segregationist employment patterns." Pet. 15. Respondents submit that petitioner is wrong on the facts and the law. The historical background against which the seniority system was estabished is an important source of evidence. See, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S at 267. Certainly, the fact that until July 29, 1963, Georgia Power pursued an "open and unvarying" policy that prevented blacks from competing for any but the most menial and low-paying jobs is significant. Ibid. More importantly, the objective evidence reveals that accommodations were made to the racial imperatives that governed at Georgia Power during that era, and

that the seniority system did not escape unscathed. The Fifth Circuit properly took note that until 1969, the formation of functionally related lines of progression yielded to the dominant social requirement of racial separation. App. 14a.

As to the fourth factor, that the seniority system was not maintained from of any discriminatory purpose, we note that the racial gerrymandering of the seniority system remained unaltered until 1969. App. 14a. Moreover, shortly after the company abandoned the policy of racial segregation in 1963, it imposed testing and formal education requirements, applicable to traditionally all-black jobs only, with the foreseeable consequence of severely limiting the number of blacks who could transfer to formerly white jobs. App. 2a.

Given these facts, a finding follows that the seniority system at issue here is

not entitled to the limited immunity accorded bona fide seniority systems by § 703(h) of Title VII. The Fifth Circuit was faithful to the teachings of this Court in Teamsters.

CONCLUSION

The 1971 findings of the district court as well as the record in this case demonstrate that the seniority system at issue here is not bona fide as that term has been defined in Teamsters. As noted above, the Fifth Circuit has faithfully applied the principles of Teamsters.

For the above described reasons, the union's petition should be denied.

Should this Court ~~be~~ [not decide] to deny the petition now, respondents respectfully suggest that this case and Pullman-Standard v. Swint, No. 80-1190, be con-

sidered together. We make this suggestion for two reasons:

First, the major findings of fact here are not in dispute, unlike Pullman-Standard in which the factual setting is unusual. In Pullman-Standard the district court made critical findings based in part on court-prepared statistical analyses which were not reproduced for consideration on review. As a result, the Fifth Circuit was required to conduct its own detailed review of the facts. Here, the parties and the Fifth Circuit both have relied on the 1971 district court findings.

Second, the outcome of Pullman-Standard is of little practical significance to the affected employees.[6/] The Pullman-

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6/ We do not suggest that Pullman-Standard is moot. The extent to which plaintiffs are entitled to recover backpay remains a live issue.

Standard plant in Birmingham has shut permanently. Its bargaining unti employees were terminated in January 1981.[7/] In contrast, the Georgia Power Company supplies electricity to homes and businesses in virtually all parts of Georgia, and the collective bargaining agreement at issue in this case affects several thousand incumbent empoloyees at locations throughout the state. Thus, here, unlike in Pullman-Standard, the seniority expectations of thousands of workers will be affected.

Consideration of this case along with Pullman-Standard would permit this Court to formulate a rule of law in the crucible of contested issues of practical importance,

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7/ See, Brief of Petitioner Steelworkers in No. 80-1193, p. 5 n.4 and Brief in Opposition (to petition for grant of Certiorari) in Nos. 80-1190, 80-1193, p. 10 n.22.

the historic process which has long been recognized as contributing to wise decisionmaking. See Poe v. Ullman, 367 U.S. 497, 505 (1961).

Respectfully submitted,

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No. 80-2117

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's seniority system was not bona fide within the meaning of Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 634 F. 2d 929. The opinion of the district court (Pet. App. 23a-31a) is reported at 470 F. Supp. 649. A subsequent order of the district court (Pet. App. 18a-22a) is unreported. An earlier opinion of the court of appeals (Pet. App. 32a-69a) is reported at 474 F. 2d 906. An earlier opinion of the district court (Pet. App. 70a-128a) is unofficially reported at 3 Fair Empl. Prac. Cas. 767.

JURISDICTION

The judgment of the court of appeals (Pet. App. 129a-130a) was entered on January 22, 1981. On April 2, 1981, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 21, 1981 (Pet. App. 131a). The petition for a writ of certiorari was filed on June 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1969, the United States filed suit in the United States District Court for the Northern District of Georgia, charging that the Georgia Power Company and petitioner's predecessor unions, which were parties to collective bargaining agreements with Georgia Power, had engaged in a pattern or practice of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 74a). The government's suit was consolidated for trial with two private actions (*ibid.*).

District Judge Smith found that until 1963, Georgia Power assigned all black employees and no white employees to the jobs of laborer, porter, janitor, and maid (Pet. App. 2a, 79a). These were the lowest-paying jobs, and Georgia Power did not permit blacks to transfer to higher-paying positions (*id.* at 2a). In 1963, Georgia Power began allowing blacks to transfer to higher-paying jobs, but only if they had a high school diploma and passed a series of aptitude tests. These two requirements did not apply to other transfers within the company (*ibid.*). After 1963, Georgia Power continued to assign almost all blacks to the lowest-paying jobs; some whites were assigned to jobs as laborers but none to the other three jobs (*id.* at 82a, 84a-85a).

The collective bargaining agreements established lines of progression through which employees could advance to higher-paying jobs without loss of seniority (Pet. App. 76a). But unlike other jobs, the all-black jobs of laborer, janitor, porter and maid were not in lines of progression (*id.* at 77a-78a). As a result, black employees could advance to higher-paying jobs only by transferring to a new section and forfeiting their seniority (*ibid.*). The small number of whites assigned to the laborer job after 1963 were promoted to higher paying positions far more quickly than blacks (*id.* at

34a).[1] In 1969, a collective bargaining agreement modified the seniority system by placing the laborer job, but not the other "black" jobs, in a line of progression (*id.* at 3a).

In 1971, the district court held that Georgia Power's practices before 1963 operated to keep blacks perpetually beneath whites hired at the same time but that the operation of the seniority system after 1963 did not violate Title VII (Pet. App. 3a-4a). It also found the high school diploma requirement unlawful but the testing program lawful (*ibid.*). On appeal, the Fifth Circuit affirmed the district court's holdings on the high school diploma requirement and on Georgia Power's practices before 1963 (*id.* at 49a-51a, 63a-66a), but vacated and remanded the district court's holding on the testing program, finding that the program had not been validated (*id.* at 48a-49a). It added that if the district court found the test invalid, it should grant seniority relief "to all blacks wrongfully deprived of the opportunity to advance beyond the positions of laborer, porter, janitor, or maid by either the testing or the high school education requirements" (*id.* at 68a).

In 1974, after the court of appeals' remand, the parties entered into a consent decree which, among other things, awarded seniority on the basis of time employed by the company, not time spent in a section, to all janitors, porters and maids; to black laborers hired before 1969, when the laborer job became part of a line of progression; to black laborers hired after 1969 who were denied the opportunity to transfer by the high school diploma requirement and the testing program; and to all applicants for employment whom the company failed to hire because of their race (Pet. App. 4a-5a).

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[1] Between 1963 and the time suit was brought, whites had remained as laborers an average of three months and one week; blacks remained as laborers an average of two years and nine months (Pet. App. 34a).

2. Approximately four years later, petitioner moved to vacate this part of the final decree (Pet. App. 5a). Petitioner claimed that *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), made the award of seniority relief inequitable (Pet. App. 5a). Over the opposition of the United States and private plaintiffs, District Judge Murphy[2] agreed that the award of seniority relief in the consent decree was based on the view rejected in *Teamsters* (*id.* at 5a-6a). In response to the government's argument that *Teamsters* was inapplicable because the Georgia Power seniority system was not bona fide, the district court said (*id.* at 26a-27a):

> A "bona fide" seniority system is one which is negotiated and maintained without a discriminatory purpose. * * * There is no evidence before the Court indicating that the seniority provided for in the collective bargaining agreement * * * is not "bona fide" * * *. Indeed, the Court notes that the system * * * is not untypical * * *.

The district court accordingly granted petitioner's motion in substantial part (*id.* at 27a-28a).[3]

The court of appeals reversed. It held that although the decision in *Teamsters* was the kind of change in circumstances that could justify a modification of a final decree (Pet. App. 6a-10a), petitioner's seniority system was not bona fide (*id.* at 10a-16a). The court said that the "key to the bona fides of a seniority system that may have a discriminatory effect is the absence of purposeful discrimination" (*id.* at 10a). In inquiring into purposeful discrimination, the court said it would examine "the totality of circumstances" with

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[2]District Judge Smith had left the bench in the interim.

[3]The district court preserved seniority relief for black applicants who had been denied employment on the basis of race (Pet. App. 6a). See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

particular emphasis on four factors identified by *Teamsters* and by the Fifth Circuit's decision in *James* v. *Stockham Valves & Fittings Co.*, 559 F. 2d 310, 351-352 (5th Cir. 1977):

> These factors include: whether the seniority system operates to discourage all employees equally from transferring between seniority units; whether the seniority units are in separate bargaining units and, if so, whether that structure is rational and in conformance with industry practice; whether the seniority system had its genesis in racial discrimination; and whether the system was negotiated and has been maintained free from any illegal purpose.

Pet. App. 10a-11a. The court of appeals also noted (*id.* at 11a) that Judge Murphy's "terse" treatment of the question whether the Georgia Power system was bona fide had overlooked many of Judge Smith's findings.

The court concluded, on the basis of those findings, that Georgia Power's seniority system was not bona fide. It noted that although the system was neutral on its face—all employees lost seniority when they transferred from one section to another—"[t]his facial equality * * * was but a mask for the gross inequality beneath" (Pet. App. 12a), because with few exceptions all blacks and only blacks were assigned to jobs from which they could transfer only by giving up their seniority; whites could be promoted through lines of progression and retain their seniority (*id.* at 12a-13a, 14a). The court also reasoned (*id.* at 13a) that the seniority system was instituted "in an era of overt racial discrimination at Georgia Power" and that, by excluding the black jobs from lines of progression, the system served precisely the objectives that Georgia Power was pursuing through its overtly discriminatory hiring and assignment policies (*id.* at 13a-14a). The court concluded that this was " 'a clear pattern, unexplainable on grounds other than

raçe' " (*id.* at 16a, quoting *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)) that demonstrated, in light of all the circumstances, that Georgia Power's seniority system was not bona fide.

ARGUMENT

1. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), interpreted Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-(2)(h), to create a limited exception to Title VII for certain "neutral, legitimate seniority system[s]" (431 U.S. at 353) that would otherwise be unlawful because they perpetuate the effects of prior discrimination (*id.* at 348-356). But *Teamsters* emphasized that Section 703(h) "does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race * * *' " (431 U.S. at 353). The court of appeals correctly held that Georgia Power's seniority system was not bona fide, at least insofar as it excluded the jobs of laborer, porter, maid, and janitor from legitimate lines of progression.

First, the court of appeals was plainly correct in refusing to regard the seniority system as a neutral scheme that "applie[d] equally" to all employees (see *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 355). Petitioner suggests that the court reached this conclusion solely on the basis of the system's "disparate impact" on black employees (Pet. 14-15). But unlike *Teamsters* (see 431 U.S. at 356), this is not a case in which far more whites than blacks were injured by the challenged aspect of the seniority system. See also *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 275 (1979); *id.* at 281 (Stevens, J., concurring). The Georgia Power seniority system attached a special disadvantage—the inability to be promoted without losing seniority—to precisely those jobs

which the employer had ensured would be exclusively or, in the case of the laborers, predominantly black. Having ensured that blacks would occupy certain jobs, Georgia Power—and petitioner, which joined Georgia Power in sponsoring the system—cannot pretend that a seniority system which singles out those jobs is in some sense "neutral"; indeed, it is difficult to see how a system could be less neutral without being explicitly racial, and the parties to a collective bargaining agreement are unlikely to use explicitly racial language.

This factor alone may not necessarily show that the system was not bona fide, and the court of appeals did not treat it as conclusive. But the lack of neutrality at least created a strong inference of discrimination that required the sponsors of the seniority system to provide legitimate reasons for subjecting to a disability only the jobs that had been deliberately limited to black employees.

Second, the court of appeals properly considered the role of past racial discrimination by Georgia Power. Petitioner correctly suggests (Pet. 16-17) that any seniority system which perpetuates the effects of past discrimination is likely to have been adopted at a time of pervasive discrimination, so again this factor alone cannot be decisive. But in cases dealing with the definition of discriminatory purpose under the Equal Protection Clause, the Court has recognized that "a consistent pattern of official racial discrimination" or "a series of official actions taken for invidious purposes" can be strong evidence that a subsequent or contemporaneous official action was also discriminatorily motivated. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.14, 267 (1977). Any difficulties in imputing the motives of public officials to their successors, or to officials at a different level of government (see *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 & n.20 (1980) (plurality opinion)), are substantially diminished when the issue involves only the actions of a single pair of collective

bargaining agents over a relatively short period of time. At the very least, when an employer has unquestionably engaged in a consistent pattern of discrimination, there is no reason to presume that contemporaneous actions which severely disadvantage blacks are nondiscriminatory and taken for legitimate purposes.

In this case, in particular, the seniority system was suspect. Georgia Power adopted a variety of unlawful devices—the discriminatory hiring and transfer practices and the diploma and testing requirements—to bar blacks from all but the lowest-paying jobs. The seniority system, insofar as it excluded those jobs from lines of progression, served exactly the same purpose. It is possible that legitimate business objectives led Georgia Power to adopt policies that, coincidentally, furthered its racially discriminatory aims. But again, at the very least, the court of appeals properly required those defending the system to establish this justification.

Petitioner asserts (Pet. 15) that because Georgia Power would not have permitted blacks in any other jobs in any event, the seniority system's restrictions were not needed to enforce segregation; therefore, petitioner suggests, those restrictions must have been adopted for a legitimate, nondiscriminatory reason. This argument is specious. According to Judge Smith's findings about the seniority system (Pet. App. 77a):

> [P]romotions, competency being sufficient, * * * are based upon an employee's [job] classification seniority in the respective section of the seniority division[4] in

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[4]The "sections" were the lines of progression consisting of several jobs or, in the case of the "black" jobs, a single job; an employee could not transfer his seniority from one section to another. The "divisions" were the larger administrative units into which Georgia Power divided its operations (Pet. App. 75a-78a). Georgia Power's use of divisions is not at issue here.

> which he is employed. First preference in filling a job vacancy is given to the senior employee, competency being sufficient, in the same classification in the same section and division where the vacancy exists, requesting such transfer. If no such employee requests a * * * transfer, the vacancy is filled by the promotion of the most senior employee, competency being sufficient, in the next lower classification in the section * * * requesting such promotion.

Thus, placing black employees in lines of progression would potentially have enabled them to claim, under the collective bargaining agreement, that they were entitled to certain promotions; excluding the black jobs from lines of progression permitted Georgia Power to avoid having to promote competent black employees.

In fact, petitioner's assertion (Pet. 15) that Georgia Power was unalterably committed to segregation suggests another reason for presuming the invalidity of the seniority system. In some circumstances, collective bargaining might be expected, and presumed, to produce an agreement that furthers legitimate business and employee objectives. But, as petitioner says, Georgia Power was evidently determined to maintain its discriminatory employment practices, and while petitioner's predecessors were found not to discriminate in internal union affairs (see Pet. App. 104a), there is no showing that they ever attempted to press black employees' interests in being free from discrimination by the company. In other cases where seniority systems were challenged, the Fifth Circuit has concluded that a union "sought to bring about a nondiscriminatory [seniority] * * * system" or "opposed [discrimination] * * * through every means in [its] power." *Terrell* v. *United States Pipe & Foundry Co.*, 644 F. 2d 1112, 1121 (5th Cir. 1981). But the courts below made no such determination in this case, and

petitioner points to no evidence suggesting that the unions offered to make concessions or bargained in any other way for their black members' freedom from discrimination.[5]

Consequently, Georgia Power's seniority system must be viewed as the product of collective bargaining between an employer determined to prefer racially discriminatory practices over a rational allocation of personnel based on such factors as ability, and unions that did not resist the employer's choice. In deciding whether an institutional decision was made with discriminatory intent, the Court has always paid close attention to the process by which the decision was made; when a process that afforded a clear opportunity for deliberate discrimination yielded a result that disproportionately disadvantaged blacks, the Court has presumed a discriminatory purpose and required the party defending the result to show otherwise. See, *e.g., Castaneda* v. *Partida,* 430 U.S. 482 (1977); *Alexander* v. *Louisiana,* 405 U.S. 625, 631-632 (1972). The collective bargaining process at Georgia Power enabled the employer to carry out his determination to discriminate, and the results, of course, disproportionately affected blacks. For this reason, also, the court properly required petitioner to justify the seniority system.

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[5]Petitioner cites (Pet. 9-10) Judge Smith's general finding that there had been "no showing of any conscious intent" to discriminate on the part of petitioner's predecessor unions (Pet. App. 115a). But it is entirely possible for a discriminatory seniority system to be established over the union's opposition or—as in this case—with the unions' apparent acquiescence. The unions' culpability may be relevant to determining their liability for back pay (see, *e.g., Terrell* v. *United States Pipe & Foundry Co., supra,* 644 F. 2d at 1120-1121; *James* v. *Stockham Valves & Fittings Co., supra,* 559 F. 2d at 353-354; see generally *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-423 (1975)), but this case involves only equitable relief, which is appropriate irrespective of the unions' culpability if the seniority system was not bona fide.

Petitioner points to no evidence, and we know of none in the record, showing that Georgia Power's exclusion of the "black" jobs from lines of progression served a legitimate business purpose. Petitioner appears to acknowledge that the exclusion of the laborer's job from a line of progression before 1969 (the year in which suit was brought) served no legitimate purpose (Pet. 17 n.5). Petitioner asserts that the janitor, porter, and maid positions were "functionally unrelated to any other jobs" (*id.* at 16 n.5), but this assertion is unsubstantiated by any citation to the record. Therefore, petitioner did not overcome the strong showing that the provision of the seniority system that excluded the "black" jobs from lines of progression was adopted for a discriminatory purpose, and the court of appeals was correct in its conclusion that in this respect the seniority system was not bona fide.

2. Because the court of appeals' decision was correct, we would ordinarily ask this Court to deny the petition for a writ of certiorari. But in *Swint* v. *Pullman-Standard,* 624 F. 2d 525 (5th Cir. 1980), cert. granted, Nos. 80-1190 & 80-1193 (Apr. 20, 1981), a different panel of the Fifth Circuit applied the criteria used in this case and previously described by *Teamsters* and by *James* v. *Stockham Valves & Fittings Co., supra,* to hold that a seniority system was not bona fide. For reasons we expect to explain in a brief amicus curiae in *Pullman-Standard,* we believe that even if the Court reverses the decision in *Pullman-Standard,* the result reached by the Fifth Circuit in the present case should be allowed to stand. Nevertheless, if there is a possibility that the decision in *Pullman-Standard* will affect the present case, the Court may wish to hold this petition and dispose of it in light of the decision in *Pullman-Standard.*

CONCLUSION

The Court may wish to hold the petition for a writ of certiorari pending its decision in *Pullman-Standard* v. *Swint* and *United Steelworkers of America, AFL-CIO* v. *Swint*, Nos. 80-1190 & 80-1193. Otherwise, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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